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NORTH DAKOTA SUPREME COURT REVIEW

The Supreme Court Review briefly summarizes important decisions rendered by the North Dakota Supreme Court. The purpose of the Review is to indicate cases of first impression and cases that significantly affect earlier interpretations of North Dakota Law. The Review was written by Kristi M. Adams, MaryAnn Leavitt, and Jennifer L. Thompson as a special project for the NORTH DAKOTA LAW REVIEW.

The following topics are included in the Review:

RABOIN V. NORTH DAKOTA DEPARTMENT OF HUMAN SERVICES

In *Raboin v. North Dakota Department of Human Services,*[1] Jim and Kim Raboin appealed from a district court judgment affirming a Department of Human Services finding of probable cause to indicate child abuse by the Raboins in disciplining their six children.[2] The North Dakota Supreme Court concluded that there was a statutory right to appeal to the courts from the department's findings.[3] The court also concluded that the department's finding of probable cause was not supported by a preponderance of the evidence and reversed and remanded the case to the district court with an order to vacate the probable cause finding.[4]

The Raboins were married and lived with their six children, all of which were under the age of eleven at the time of the proceeding.[5] As a last resort in disciplining their children, the Raboins used corporal punishment in the form of spanking the children on the buttocks with a plastic spoon or a leather belt.[6] The number of "whacks" was predetermined according to the seriousness of the misconduct.[7] Cass County Social Services received a report that the Raboins were striking their children with objects as a form of discipline.[8] In accordance with section 50-25.1-05 of the North Dakota Century Code, the Department of Human Services (Department) investigated the allegation and issued a written report concluding that there was probable cause to believe child abuse had occurred.[9] The case was referred by social services to the state's attorney, who concluded there was no basis to bring charges or begin legal proceedings.[10] The Raboins requested a review by the Department[11] and after a formal administrative hearing, the hearing officer recommended the determination of probable cause of child abuse be reversed and the reversal noted in the Department's child abuse information index.[12] The recommendation was rejected by the Department director and the Raboins appealed to the district court, which upheld the Department's finding of probable cause.[13] The Raboins then appealed to the North Dakota Supreme Court.[14]

1. 552 N.W.2d 329 (N.D. 1996).
2. Raboin v. North Dakota Dep't of Human Servs., 552 N.W.2d 329, 330 (N.D. 1996).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 331.
8. *Id.*
9. *Id.*; *see also* N.D. CENT. CODE §§ 50-25.1-05.2, -05.4 (Supp. 1997).
10. *Raboin,* 552 N.W.2d at 331.
11. *See* N.D. CENT. CODE § 50-25.1-05.4 (Supp. 1997); N.D. ADMIN. CODE § 75-03-18-02 (1997).
12. *Raboin,* 552 N.W.2d at 331.
13. *Id.*
14. *Id.*

The North Dakota Supreme Court's first consideration was whether there was a right to appeal a decision of the Department of Human Services to the courts.[15] The court, in its reading of section 50-25.1-05.4 and its legislative history, concluded that the legislature's intent was to provide only an internal administrative review of probable cause determinations by the Department.[16] However, the court found the decision was appealable under the Administrative Agencies Practice Act.[17] In doing so, the court had to determine whether the Department's finding of probable cause was a final order.[18] The North Dakota legislature created a process by which persons interested in providing child care could be voluntarily listed in a "carecheck registry" showing they have no criminal record or past history of child abuse.[19] The court noted that there is no appeal process or other recourse provided by that statute for persons denied placement in the registry.[20] As a result, the court noted that "the probable cause determination precludes persons from being listed in the registry and potentially jeopardizes their ability to secure and retain clientele for daycare services or to secure employment in child care."[21] The court concluded that the consequences of a probable cause finding affects the legal rights or interests of the person against whom the finding is directed and therefore constitutes an appealable final order under chapter 28-32 of the North Dakota Century Code.[22]

Once a right of appeal was established, the court looked to the Raboin's assertion that the probable cause determination of the Department was not supported by the evidence and was not in accordance with the law.[23] The court noted that when an administrative agency decision is appealed, the court reviews the decision of the agency, not the district court.[24] In rejecting the Department's suggestion that the court decides only if "the department could reasonably have found its employee did not act arbitrarily, capriciously, or unreasonably," the court stated that its review is de novo and constitutes a determination of "whether the agency's findings of fact are supported by a preponderance of the evidence, its conclusions of law are supported by its findings of fact, and its decision is in accordance with the law."[25] The Department based its

15. *Id.*
16. *Id.* at 331-32.
17. *Id.* at 332; *see also* N.D. CENT. CODE § 28-32-15 (Supp. 1997) (authorizing appeals from "final orders" of administrative agencies).
18. *Raboin*, 552 N.W.2d at 332.
19. *Id.* (citing N.D. CENT. CODE § 50-11.1-06.2 (1995)).
20. *Id.* at 333.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* (citing Southeast Human Serv. Ctr. v. Eiseman, 525 N.W.2d 664, 669 (N.D. 1994)).

findings of probable cause to indicate child abuse upon the interview of two of the Raboin's children; one age ten, who stated that he had been swatted "five years ago" for swearing and had a "black and blue mark for a couple minutes," and the other, age nine, who said he had been spanked for kicking his little sister and had bruises, but was not able to describe them.[26] The court, in light of this evidence and the statutory definitions of the terms "abused child"[27] and "harm,"[28] concluded there was no evidence from which to conclude the Raboins had committed child abuse and that the spankings "fall far short of the statutory definition of child abuse."[29]

In finding that the Raboins' actions did not constitute child abuse, the court stated that it need not address the Raboins' assertion that their methods of discipline were based on the practice of their religious beliefs.[30] Justice Neumann joined the majority opinion by saying that it properly applied the statutory definitions of "child abuse" and "harm," but also stated that he believes corporal punishment is "a practice to be avoided" because it "can only diminish a child's sense of self-worth, and thereby unnecessarily limit the resources that child can bring to life's battles."[31]

CIVIL PROCEDURE—JOINDER OF PARTIES

BELDEN V. HAMBLETON

In *Belden v. Hambleton*[32] the North Dakota Future Fund (the Fund) and Safe Corporation International, Inc. (SCI) entered into a loan agreement on September 10, 1992, whereby the Fund received a security interest in SCI's accounts receivable, inventory, machinery, and equipment.[33] On February 14, 1995, SCI transferred property to the Fund under a bill of sale and on June 8, 1995, after SCI failed to make

26. *Id.* at 334.

27. *See* N.D. CENT. CODE § 50-25.1-02(2) (Supp. 1997) (defining "abused child" as "an individual under the age of eighteen years who is suffering from serious physical harm or traumatic abuse caused by other than accidental means by a person responsible for the child's welfare, or who is suffering from or was subjected to any act involving that individual in violation of sections 12.1-20-01 through 12.1-20-08").

28. *See* N.D. CENT. CODE § 50-25.1-02(5) (Supp. 1997) (defining "harm" as "negative changes in a child's health which occur when a person responsible for the child's welfare: (a) Inflicts, or allows to be inflicted, upon the child, physical or mental injury, including injuries sustained as a result of excessive corporal punishment").

29. *Raboin*, 552 N.W.2d at 334-35; *see also* N.D. CENT. CODE § 12.1-05-05(1) (Supp. 1997) (providing in part that "a parent . . . may use reasonable force upon the minor for the purpose of safeguarding or promoting his welfare, including prevention and punishment of his misconduct, and the maintenance of proper discipline").

30. *Raboin*, 552 N.W.2d at 335.

31. *Id.*

32. 554 N.W.2d 458 (N.D. 1996).

33. Belden v. Hambleton, 554 N.W.2d 458, 459 (N.D. 1996).

payments, the Fund held a liquidation sale of the property.[34] At the same time, employees of SCI brought an action against SCI for unpaid wages.[35] The action was removed from small claims court to district court.[36] The district court, on its own motion and pursuant to Rule 19 of the North Dakota Rules of Civil Procedure,[37] joined the Fund as a party defendant to the action for unpaid wages and ordered the Fund to deposit the money from the liquidation sale with the court.[38] The Fund appealed the joinder and moved for a stay of the deposit of the money with the court pending appeal.[39] "The stay was denied on grounds the deposit order was not a final order."[40]

The Fund asserted that a secured creditor has no obligation to satisfy the unsecured wage claims of former employees.[41] The North Dakota Supreme Court noted this was an interlocutory order which is usually not appealable, but stated that some orders are appealable even though they are not final, provided they fall within the list of appealable orders codified in the North Dakota Century Code.[42] The Fund, citing *Wosepka v. Dukart,*[43] argued that the joinder was appealable as an order involving the merits of the action.[44] The court distinguished *Wosepka*, which involved joinder by the defendant of another defendant, forcing the plaintiff to proceed against a defendant the plaintiff did not want to sue.[45] The plaintiff in *Wosepka* appealed the joinder.[46] The court, in distinguishing *Wosepka,* noted that the employees in the case at hand had not appealed the joinder.[47] The court stated further that restricting interlocutory appeals was supported by sound reasoning because it is premature to review an order before a final judgment has been entered by the district court and concluded that this situation was one that falls under the general rule that an order joining parties is not an appealable order.[48]

In the alternative, the Fund requested that the North Dakota Supreme Court supervise the case during oral argument, as provided by Article VI, section 2 of the North Dakota Constitution for extraordinary

34. *Id.* at 459.
35. *Id.*
36. *Id.*
37. N.D. R. CIV. P. 19.
38. *Belden*, 554 N.W.2d at 460.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*; *see also* N.D. CENT. CODE § 28-27-02 (1995).
43. 160 N.W.2d 217, 218 (N.D. 1968).
44. *Belden*, 554 N.W.2d at 460.
45. *Id.*
46. *Id.*
47. *Id.* at 461.
48. *Id.* at 460-61.

cases to prevent injustice where no other remedy is available.[49] The court found that supervision was appropriate because the district court overstepped the bounds of its role as an impartial adjudicator when it joined the Fund on its own motion.[50] Because there were no pleadings filed concerning the joinder, the Fund could not ask for a judgment on the pleadings, move for summary judgment, or argue the joinder as a frivolous action, ultimately leaving the Fund without recourse to test the legality of the claim before the matter went to trial.[51]

The court stated that before a person can be joined as a party in an action, there must be a showing that in the person's absence, complete relief cannot be accorded the parties already involved.[52] In this case, the court concluded, the Fund was not a party "needed for just adjudication" of the employees' claim and therefore, there was no legal basis to make the Fund liable to the unpaid employees.[53] The court directed the district court to dismiss the Fund as a defendant and return the sale proceeds to the Fund.[54]

CRIMINAL LAW—DISCOVERY

STATE V. HANSON

In *State v. Hanson*,[55] the State appealed a district court order declaring a statute granting the prosecutor reciprocal discovery in criminal cases unconstitutional and limiting discovery in its prosecution of Dale Clayton Hanson.[56] The North Dakota Supreme Court affirmed.[57]

Dale Hanson was charged with driving an automobile while under the influence of intoxicating liquor.[58] Hanson's lawyer, under Rule Sixteen of the North Dakota Rules of Criminal Procedure, requested discovery of documents, tangible objects, reports of examinations and tests,[59] and the names of prosecution witnesses and their statements.[60] After

49. *Id.* at 461; *see also* N.D. CONST. art. VI, § 2.
50. *Belden*, 554 N.W.2d at 461.
51. *Id.*
52. *Id.* (quoting N.D. R. CIV. P. 19).
53. *Id.*
54. *Id.*
55. 558 N.W.2d 611 (N.D. 1996).
56. State v. Hanson, 558 N.W.2d 611 (N.D. 1996).
57. *Id.*
58. *Id.*
59. *Id.* (citing N.D. R. CRIM. P. 16(a)(1)(C) and (D)).
60. *Id.* (citing N.D. R. CRIM. P. 16(f)(1)).

observing Hanson's discovery request, the State, under Rule Sixteen[61] and North Dakota Century Code section 29-01-32,[62] requested from Hanson the names and addresses of persons Hanson intended to call as witnesses, their statements or reports, the results of examinations, tests, experiments, or comparisons, and any real evidence Hanson intended to offer at trial.[63]

Hanson moved for an order limiting disclosure to that required by Rule Sixteen, asserting that under the state statute he had no duty to disclose the information sought by the State.[64] The trial court found the statute unconstitutional under the separation of powers doctrine[65] and the North Dakota Constitution.[66] The trial court ordered that Hanson need only comply with the State's discovery request to the extent Rule Sixteen mandated such disclosure.[67] The State appealed.[68]

The supreme court explained that while no general right of appeal exists unless provided for by statute,[69] a district court decision holding a

61. *Id.* Rule 16(a)(1)(C) and (D) of the North Dakota Rules of Criminal Procedure addresses the prosecution's disclosure of documents, tangible objects, physical or mental examinations, and results or reports of scientific tests or experiments. *Id.* at 612. Rule 16(f) requires the prosecution, upon receipt of a written defense request, to disclose the names, addresses, any statements of prosecution witnesses the prosecutor intends to call in presenting the case in chief, statements of codefendants, and statements of other persons. *Id.* at 613. After the prosecution's compliance with the defense request for discovery under Rule 16(a) (1) (C) or (D), Rule 16 (b), "imposes a narrower disclosure duty upon defendants than" that contained in N.D. CENT. CODE § 29-01-32 (1995) (repealed 1997). *Id.* at 612. Rule 16 does not require the defense to make similar disclosures. *Id.* at 613.

62. *Id.* (citing N.D. CENT. CODE § 29-01-32 (1995) (repealed 1997)). Section 29-01-32 states in pertinent part:

> Upon the prosecuting attorney's compliance with a written request of the defendant for disclosure under subparagraph C or D of paragraph 1 of subdivision a of rule 16 or subdivision f of rule 16 of the North Dakota Rules of Criminal Procedure, the defendant, upon written request by the prosecuting attorney, shall reciprocate in kind and disclose to the prosecuting attorney:
>
> a. The names and addresses of persons, other than the defendant, the defendant's attorney intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons that the defendant intends to offer in evidence at the trial.
>
> b. Any real evidence that the defendant intends to offer in evidence at the trial.

N.D. CENT. CODE § 29-01-32 (1995) (repealed 1997).

63. *Hanson*, 558 N.W.2d at 612.

64. *Id.* at 611.

65. *Id.* at 611 n.1 (citing State *ex rel.* Spaeth v. Meiers, 403 N.W.2d 392, 394 (N.D. 1987), where the court stated, "[T]he creation of the three branches of government by our constitution operates as an apportionment of the different classes of power whereby there is an implied exclusion of each branch from the exercise of the functions of the others").

66. *Id.* at 611-612 (citing N.D. CONST. art IV, § 3).

67. *Id.* at 612.

68. *Id.*

69. *Id.* at 612 (citing City of Bismarck v. Materi, 177 N.W.2d 530, 535 (N.D. 1970)).

statute unconstitutional is appealable.[70] The court further explained that whereas the statute required a defendant who received information from the prosecuting attorney to reciprocate by disclosing to the prosecutor the names and addresses of persons the defendant intended to call as witnesses at trial and any statement or reports of those people, Rule Sixteen did not.[71] Therefore the statute was in direct conflict with Rule Sixteen, which required only limited pretrial disclosure of information, while allowing additional disclosure by order or agreement.[72] Procedural rules adopted by the supreme court must prevail in a conflict with a statutory procedural rule.[73] Consequently, the court held the statute invalid to the extent that it required pretrial disclosure by a defendant of the names and addresses of persons the defendant intended to call as witnesses at trial and any statements or reports of statements of such persons.[74]

CRIMINAL LAW—JURY INSTRUCTIONS

STATE V. HUBER

In *State v. Huber*,[75] the defendant, Benjamin Huber, appealed a jury conviction of driving under the influence of alcohol (DUI), claiming the district court erred in allowing the State to amend the jury instructions to include "actual physical control" (APC).[76] The North Dakota Supreme Court reversed and remanded for a new trial, finding that the district court failed to properly distinguish between APC and DUI in its jury instruction and that the district court's failure to amend the jury verdict forms violated Huber's right to due process.[77]

On August 4, 1995, a Mercer County deputy sheriff received a report of a suspicious vehicle on County Road 21.[78] The officer responded to the report, and when he arrived at the location, he observed a person standing outside of a black pickup which was off to the side of the road, and two persons inside the pickup—one behind the wheel and the other in the passenger's seat.[79] The person standing outside of the

70. *Id.* There was no statute permitting the State's appeal. *Id.* Four out of the five North Dakota supreme court justices must agree before a statute enacted by the legislature may be declared unconstitutional. *Id.* (citing N.D. CONST. art. VI, § 4; *Materi*, 177 N.W.2d at 537).

71. *Id.* at 615.

72. *Id.* at 613. *See id.* at 615 n.5 (noting that Rule 16 of North Dakota's Rules of Criminal Procedure is not intended to limit a trial court's "discretion to order broader discovery in appropriate cases," or to discourage or stop the parties from offering to disclose other matters).

73. *Id.* at 615 (citing N.D. CONST. art. VI, § 3).

74. *Id.*

75. 555 N.W.2d 791 (N.D. 1996).

76. State v. Huber, 555 N.W.2d 791, 792 (N.D. 1996).

77. *Id.* at 797-98.

78. *Id.* at 793.

79. *Id.*

pickup and the person behind the wheel were arguing.[80] After the officer observed the vehicle move forward, he approached the running vehicle and identified the person behind the wheel as the defendant, Benjamin Huber.[81] The officer asked Huber to perform several field sobriety tests and thereafter arrested Huber for driving under the influence.[82]

The morning of the trial, the State moved to amend the jury instruction on the "essential elements of the offense" to include the phrase "or was in actual physical control of a motor vehicle."[83] Huber objected, but the district court amended the instruction and instructed the jury that "[t]he prosecution satisfies its burden of proof only if the evidence shows beyond a reasonable doubt . . . Huber[ ] did operate or was in actual physical control of a motor vehicle . . ."[84] Although the jury instruction was amended, the court did not amend the verdict forms to include a guilty verdict for APC.[85] Consequently, the jury found Huber guilty of DUI.[86]

On appeal, Huber claimed that the jury instruction was reversible error because DUI and APC are two distinct offenses since it is possible to commit APC without committing the offense of DUI.[87] The State, however, argued that the instruction was not reversible error because it did not add a new or different offense to the information since APC and DUI are found in the same statute.[88] In support of its argument, the State asserted that "drive," defined as "drive, operate, or being in physical control of a motor vehicle" under section 39-06.2-02(10), should apply to the DUI and APC statute as well.[89] Thus, because "physical control" constitutes "driving," APC and DUI would be the same offense.[90]

The North Dakota Supreme Court rejected the State's argument, finding that although DUI and APC are found in the same statute, they are distinguishable because driving is an element required of DUI, but

80. *Id.*
81. *Id.*
82. *Id.* At trial, there was a dispute over who was the driver of the vehicle. *Id.* at 796. The two other persons present said that Huber was not the driver of the pickup, but rather, he had just slid into the driver seat after the driver got out of the vehicle. *Id.* However, there is no dispute that Huber was behind the wheel with the engine running when the officer approached the vehicle. *Id.*
83. *Id.* at 793. The court's proposed instruction only included the term "operate" a motor vehicle. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 792.
87. *Id.* at 793.
88. *Id.* at 794 (citing N.D. CENT. CODE § 39-08-01(1) (1995)).
89. *Id.*
90. *Id.*

not of APC.[91] Therefore, because DUI and APC are two distinct offenses,[92] "drive" cannot mean "physical control."[93]

In the alternative, the State also argued that APC was a lesser included offense of DUI.[94] A lesser offense can only be committed if, "in order to commit the greater offense, it is necessary to commit the lesser."[95] The supreme court, agreeing with the State, found that APC is a lesser included offense of DUI because although "it is possible to be in actual physical control without driving, it is not possible to drive without being in actual physical control."[96] Thus, a person driving a motor vehicle is also in actual physical control of the vehicle.[97]

The court further determined that the instruction on the lesser included offense was appropriate because the evidence of Huber sitting behind the wheel while the vehicle was running would have allowed the jury to find Huber guilty of the lesser offense of APC.[98] The court, however, concluded that the district court erred because it did not amend the verdict forms to allow for an APC conviction.[99] The court reasoned that under the amended instruction, the jury could have found the elements required of APC and convicted Huber of DUI even if he was not guilty of DUI because the instruction allowed the jury to find Huber guilty of DUI if he had either "operated" or been in "actual physical control" of the vehicle.[100] Accordingly, the court found that because the instruction allowed Huber to be convicted of a greater offense and therefore subjected him to the consequences of that offense[101] when at the time he may only have committed a lesser offense, the instruction was not harmless error.[102]

91. *Id.* (citing City of Fargo v. Schwagel, 544 N.W.2d 873, 875 (N.D. 1996)).

92. *Id.* As further evidence that DUI and APC are different offenses, the court stated that because of the word 'or' between DUI and APC in the statute, the legislative intent was to create two distinct offenses. *Id.* (citing State v. Jacobson, 338 N.W.2d 648, 650 (N.D. 1983)).

93. *Id.*

94. *Id.* at 795.

95. *Id.* (citing *Jacobson*, 338 N.W.2d at 650).

96. *Id.*

97. *Id.* The state was not required to amend the information which charged Huber with DUI because APC is a lesser included offense of DUI and thus, Huber was put on notice of a possible APC instruction. *Id.* at 796-97.

98. *Id.* at 796.

99. *Id.* at 797.

100. *Id.*

101. *Id.* (citing N.D. CENT. CODE § 39-08-01 (1995) (holding that under North Dakota law, driving under the influence offenses carry minimum mandatory sentences)).

102. *Id.*

CRIMINAL LAW—TRIAL

STATE V. GARCIA

In *State v. Garcia*,[103] Barry Caesar Garcia appealed from a jury verdict and criminal judgment finding him guilty of murder and aggravated assault and sentencing him to life in prison without parole.[104] The North Dakota Supreme Court affirmed.[105]

In a residential neighborhood in West Fargo on November 15, 1995, Garcia, a juvenile, walked up to the front passenger door of a car where Pat and Cheryl Tendeland were in the front seat, and their friend, Connie Guler, was in the backseat.[106] Garcia fired a sawed-off shotgun through the front passenger window, wounding Pat and killing Cheryl.[107] Garcia and three other young men who had been driving around Fargo-Moorhead, were later arrested by police.[108]

Garcia was charged in juvenile court with murder, attempted robbery, aggravated assault, and street-gang crime, and was later transferred to adult court.[109] At trial, after the State's case-in-chief, the trial court granted the State's motion to dismiss the street-gang and attempted robbery charges.[110] The jury found Garcia guilty of murder and aggravated assault, and sentenced him to life in prison without parole on the murder conviction, and to a concurrent five years imprisonment on the aggravated assault conviction.[111] Garcia appealed.[112]

At trial, the State's witness, Jaime Guerrero, who was with Garcia the night of the murder, refused to testify.[113] The State's Attorney and Guerrero's lawyer requested separately that during Guerrero's testimony the court terminate expanded media coverage and partially clear the courtroom because of Guerrero's concerns about the media and spectators.[114] The State's Attorney also explained he had agreed to dismiss with prejudice the juvenile court charges against Guerrero provided he testified truthfully in Garcia's trial.[115] Garcia's lawyer argued against any closure of the trial.[116] The State's Attorney noted for the record the

103. 561 N.W.2d 599 (N.D. 1997).
104. State v. Garcia, 561 N.W.2d 599, 601 (N.D. 1997).
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 602.
114. *Id.* at 603.
115. *Id.*
116. *Id.*

State's awareness of another witness expressing a reluctance to provide testimony, although subpoenaed, because of actual repercussions the witness had already experienced.[117] Ruling that the interests of justice required suspension of the expanded media coverage order for Guerrero, the trial court terminated television and radio feeds and ordered only counsel, their clients, a detective, the immediate families of Garcia and Tendeland, and a media representative be allowed in the courtroom.[118] Guerrero testified in the partially closed courtroom.[119]

On appeal, Garcia argued his constitutional right to a public trial was violated when the trial court temporarily terminated expanded media coverage and excluded the general public from the courtroom during Guerrero's testimony.[120] The supreme court stated that the standard for closure of a trial requires the likelihood an overriding interest will be prejudiced; narrow tailoring of the closure to protect that interest; consideration of reasonable alternatives to closing the proceeding; and adequate findings to support the closure.[121] Further, a trial court's power to exclude the public from a criminal trial may be exercised only in extraordinary circumstances.[122]

Garcia argued the trial court largely ignored the trial closure standard in ordering the partial closure of the courtroom.[123] The court disagreed, explaining that since the trial court permitted the immediate family members of the Tendeland and Garcia families to remain in the courtroom, the closure was only partial.[124] While a total closure demands application of the "overriding interest" requirement, a partial closure of a court proceeding only requires a "substantial reason," a less stringent requirement, to justify the closure.[125] Given the considerable publicity surrounding the case, impact from television cameras in the courtroom, the specter of street-gang activity dramatizing the case, the court's awareness of possible "repercussions" experienced by another subpoenaed witness, and the witness's reluctance to testify due to intimidation caused by the media, the court found there existed a substantial reason to partially close Garcia's trial during Guerrero's testimony.[126]

117. *Id.*
118. *Id.* at 603-04.
119. *Id.* at 604.
120. *Id.*
121. *Id.* (citing Waller v. Georgia, 467 U.S. 39, 48 (1984)).
122. *Id.* at 604 (citing *Waller*, 467 U.S. at 48).
123. *Id.* at 605.
124. *Id.* (citing State v. Sams, 802 S.W.2d 635, 639-640 (Tenn. Ct. Crim. App. 1990)).
125. *Id.* (citing United States v. Osborne, 68 F.3d 94, 98 (5th Cir. 1995); Woods v. Kuhlmann, 977 F.2d 74, 76 (2d Cir. 1992); *Sherlock*, 962 F.2d at 1357; Nieto v. Sullivan, 879 F.2d 743, 753 (9th Cir. 1989); Douglas v. Wainwright, 739 F.2d 531, 533 (11th Cir. 1984); *Sams*, 802 S.W.2d at 640)).
126. *Id.* at 605-06.

Garcia also argued that the trial court's partial closure order was overly broad in its exclusion of the media and members of the public.[127] The court observed the presence in the courtroom of family members and a media representative,[128] stated it was Garcia's responsibility to request that the court permit other relatives or friends to remain in the courtroom during Guerrero's testimony, and noted that Garcia had not done so.[129] Additionally, the court observed that the order for partial closure was in effect only during Guerrero's testimony and concluded the partial closure was not overly broad.[130]

The trial closure standard also requires a trial court to consider reasonable alternatives to a partial closure even though doing so may bring up serious confrontation problems.[131] The court found the trial record lacked substantial consideration of reasonable alternatives to partial closure.[132] However, the court concluded that confrontation problems and reasonable alternatives were considered, with partial closure being the only adequate solution to the problem.[133]

Garcia also claimed the trial court's findings were insufficient to substantiate the partial closure order.[134] However, a trial court is not required to explain the reasoning underlying each of its findings and need only state its findings in such manner that a reviewing court can determine the basis for the order.[135] The trial court expressly considered Guerrero's reluctance to testify, his intimidation by the presence of the media and spectators in the courtroom, Guerrero's youth, and information learned from conferences between the judge, counsel, and parties.[136] Consequently, Garcia's constitutional rights to a public trial were not violated by the temporary and partial closure ordered for Guerrero's testimony.[137]

Second, Garcia also claimed that his conviction must be reversed because Guerrero's testimony was uncorroborated.[138] The court disagreed, explaining that a conviction based on an accomplice's testimony requires corroboration by other evidence connecting the defendant to the commission of the offense, and is insufficient if the evidence merely shows the commission of the offense or the circumstances thereof.[139]

127. *Id.* at 606.
128. *Id.*
129. *Id.* (citing People v. Benson, 621 N.E.2d 981, 985 (Ill. Ct. App. 1993)).
130. *Id.*
131. *Id*
132. *Id.* at 607.
133. *Id.*
134. *Id.*
135. *Id.* (citing State v. Klem, 438 N.W.2d 798, 801 (N.D. 1989)).
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 607-08 (citing N.D. CENT. CODE § 29-21-14 (1991)).

The corroboration requirement is met when other material facts tend to connect the accused with the crime.[140] The court found a number of material facts connected Garcia with the murder, thus corroborating Guerrero's testimony.[141]

Third, Garcia asserted he was denied his right to a fair trial because the State charged him with a street-gang crime knowing that he was not a gang member and that the state could not support the charge with evidence.[142] The court rejected Garcia's argument, pointing out that the street-gang statute does not require actual "membership" in a street gang for a criminal violation[143] and that a state's attorney has broad discretion in the charging process.[144]

Fourth, Garcia claimed his sentence of life in prison without parole was cruel and unusual punishment within the meaning of the Eighth Amendment.[145] The court rejected Garcia's argument, finding the sentence within statutory range and that Garcia failed to show that the trial court substantially relied on any impermissible sentencing factors.[146]

Finally, Garcia argued his due process rights under the Fourteenth Amendment were violated, resulting in a sentence that was cruel and unusual because of a "complete absence before the sentencing judge of any information which might tend to mitigate" his sentence.[147] The court rejected Garcia's argument explaining that the trial court did not have a constitutional duty to affirmatively seek out mitigating circumstances before sentencing Garcia when Garcia himself did not offer any evidence of mitigating circumstances.[148] Thus, the trial court's sentence of life imprisonment without parole in absence of mitigating evidence was not a violation of defendant's due process rights.[149]

140. *Id.* at 608 (citing State v. Marshall, 531 N.W.2d 284, 288 (N.D.1995)).

141. *Id.*

142. *Id.*

143. *Id.* Section 12.1-06.2-02 states:

> Any person who commits a felony or class A misdemeanor crime of violence or crime of pecuniary gain for the benefit of, at the direction of, or in association with any criminal street gang, with the intent to promote, further, or assist in the affairs of a criminal gang, or obtain membership into a criminal gang, is guilty of a class C felony.

N.D. CENT. CODE §12.1-06.2-02 (Supp. 1997).

144. *Garcia*, 561 N.W.2d at 608 (citing Richmond v. Haney, 480 N.W.2d 751, 759 (N.D.1992); Hennebry v. Hoy, 343 N.W.2d 87, 90-91 (N.D. 1983)).

145. *Id.* at 609.

146. *Id.* at 609-11.

147. *Id.* at 611.

148. *Id.* at 612.

149. *Id.*

EXECUTORS AND ADMINISTRATORS

IN RE ESTATE OF LUTZ

In the case of *In re Estate of Lutz*,[150] Lavilla Lutz appealed two summary judgments; the first dismissing her claim for her extraordinary services to Emanuel Lutz before his death, and the second dismissing her petition for an elective share and exempt allowances from Emanuel's estate.[151] Lavilla also appealed an order approving the distribution of Emanuel's estate.[152] The North Dakota Supreme Court reversed and remanded the case for trial of Lavilla's claims and for reconsideration of the distribution of the estate.[153]

Lavilla and Emanuel met in 1983 when she was fifty-three and Emanuel was almost sixty.[154] Lavilla moved into Emanuel's home in 1985.[155] In 1987, after discussing marriage, Emanuel said he wanted to devise most of his property to his children and grandchildren.[156] Emanuel told Lavilla he wanted a premarital agreement.[157] Lavilla claims Emanuel also told her that despite the premarital agreement there would be money left to "take care of her."[158]

In May of 1987, attorney Morris Tschider prepared premarital and testementary documents and met with Emanuel and Lavilla to discuss the documents.[159] Lavilla did not consult another attorney about her rights or the legal effect of the documents Tschider prepared.[160] Lavilla believed Tschider was acting as counsel for both her and Emanuel.[161] Tschider denies acting as her attorney and claims he told Lavilla to seek independent counsel.[162] In the premarital agreements Tschider prepared, Emanuel and Lavilla each waived any share in the other's estate "except as provided in their respective wills."[163]

150. 563 N.W.2d 90, 92 (N.D. 1997).
151. *In re* Estate of Lutz, 563 N.W.2d 90, 92 (N.D. 1997).
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* (emphasis added).
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* Emanuel and Lavilla each waived "all rights of [d]ower, courtesy, community property, homestead, inheritance, succession, surviving spouse or family allowance, exempt property, claims for support, alimony, attorneys' fees, [and] costs of property settlement." *Id.* Despite the waiver, Emanuel gave Lavilla certain property in Article II of his will. *Id.* at 92-93.

When Emanuel suffered heart trouble, and later cancer, he became very weak and begged Lavilla not to move him into a nursing home.[164] Lavilla honored his request and cared for him nearly around the clock until he died.[165] Lavilla and Emanuel had been together almost ten years when he died on November 9, 1994.[166]

On appeal, the North Dakota Supreme Court held that questions of fact precluded summary judgment as to Lavilla's compensation claim for extraordinary services.[167] Generally, when a person performs substantial services for another without express agreement for compensation, the person is entitled to the reasonable value of those services.[168] However, when services are performed by a family member in the same household, there is a presumption that services are gratuitous.[169] This presumption will only be overcome when the services are extraordinary in nature.[170] Whether or not Lavilla provided services to Emmanuel that were so exceptional and lacking in mutuality that they implied a contract to pay her was an issue of fact.[171] The court found that Lavilla's prior statement that she did not expect to be paid was not dispositive of whether she should be compensated for these services, because her initial expectation may have changed over time.[172] The court explained that the central question was whether or not, under the facts and circumstances of Lavilla's case, it was reasonably expected that compensation would be paid.[173] The court concluded that the presence of a factual inquiry rendered the compensation claim unsuitable for summary judgment.[174]

Lavilla argued the premarital agreements were procedurally defective because she lacked independent counsel and because Emanuel induced her to sign it by falsely promising to take care of her "anyway."[175] Lavilla also argued her signature was involuntary because she would not have signed if she understood her rights fully, and that her understanding was necessarily dependant upon representation by an

164. *Id.* at 92.
165. *Id.*
166. *Id.*
167. *Id.* at 93-4.
168. *Id.* at 94 (citing *In re* Estate of Raketti, 340 N.W.2d 894, 901 (N.D. 1983)).
169. *Id.* (citing *Raketti*, 340 N.W.2d at 901). The court noted, however that "[a]ny person after marriage has with respect to . . . contracts . . . the same capacity and rights and is subject to the same liabilities as before marriage, including liability to suit by his or her spouse." *Id.* (citing N.D. CENT. CODE § 14-07-05 (1991) and Riebe v. Riebe, 252 N.W.2d 175, 178 (N.D. 1977)).
170. *Id.* (citing *Raketti*, 340 N.W.2d at 901).
171. *Id.* at 94-5.
172. *Id.* at 95.
173. *Id.* at 94 (citing *Raketti*, 340 N.W.2d at 902).
174. *Id.* at 94-5.
175. *Id.* at 97.

attorney.[176] The court found that fact questions existed concerning whether Tschider adequately advised Lavilla, Lavilla's need for independent counsel before signing the premarital agreements, and the affect of Lavilla's consent to Tschider's representation of both her and Emanuel.[177] Consequently, the court reversed the summary judgment because questions of fact existed concerning Lavilla's claim that the premarital agreements were involuntarily signed and consequently unenforceable.[178]

Lavilla also argued that the premarital agreements were substantively unconscionable because of their "harshness and one-sidedness."[179] Lavilla claimed that state law precluded the enforcement of a premarital agreement that would ultimately force her to seek public assistance.[180] The court found that fact questions concerning whether enforcement of the premarital agreement would force Lavilla to seek public assistance precluded summary judgment on her claim that the agreements were unconscionable.[181] The court remanded for trial on the procedual and substantive issues.[182]

Lavilla also argued the trial court erred in approving the children's proposed distribution of the estate because the will was unambiguous.[183] She argued that the trial court modified the will by finding an ambiguity and then used extrinsic evidence to rewrite the will.[184] The court agreed that after finding an ambiguity in Emanuel's will, the trial court used the premarital agreements as controlling extrinsic evidence of Emanuel's intent in order to resolve the issue in favor of his children.[185] Due to the potential unenforceability of the documents after a trial on remand, the court reversed the trial court's construction of the will and the order

176. *Id.*

177. *Id.* at 98-9.

178. *Id.* at 99.

179. *Id.*

180. *Id.* at 100. *See* N.D. CENT. CODE § 14-03.1-06(2) (1985) which authorizes, "[i]f . . . a premarital agreement modifies or eliminates spousal support and that modification . . . causes one party . . . to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding . . . the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility." *Id.*

181. *Id.* at 100-01. The court noted that § 14-03.1-06(3) provides that the substantive enforceability of a premarital agreement is a matter of law for the court to decide. *Id.* at 100 (citing §14-03.1-06(2)). However, the courts stated that such a conclusion necessarily turns on factual findings relating to the finances of the aggreived party. *Id.* The court also referred to N.D. CENT. CODE § 30.1-05-07(2)(a), which declares a spouse's waiver of an inheritance unenforceable when "[t]he waiver, if given effect, would reduce the assets or income available to the surviving spouse to an amount less than those allowed for persons eligible for . . . assistance from any state or federal government or governmental agency for which the surviving spouse must qualify on the basis of need." *Id.* at 100 n.5 (citing § 30.1-05-07(2)(a)).

182. *Id.* at 101.

183. *Id.*

184. *Id.*

185. *Id.*

approving the proposed estate distribution, and remanded for interpretation of the will after the trial on the enforceability of the premarital agreements.[186]

The court further stated that even if the premarital agreements were enforceable, Emanuel was allowed to give Lavilla more property under a will than the minimum he consented to in the premarital agreements.[187] Further, Lavilla had not waived any gifts made by her husband's will by signing the premarital agreements in which she waived any share of Emanuel's estate, as the agreements excepted what was provided in their respective wills.[188]

FAMILY LAW—CHILD CUSTODY—DOMESTIC VIOLENCE

HEUSERS V. HEUSERS

In *Huesers v. Huesers*,[189] Marla Huesers appealed from the trial court's judgment granting Stuart Huesers custody of their children.[190] Marla and Stuart Huesers were married in July of 1988 and had three children.[191] When the couple separated in 1994, Stuart brought an action for bed and board.[192] After a separation and reconciliation, Stuart moved to amend the original complaint and filed for divorce.[193] At trial, there was evidence that both parties committed acts of domestic violence during the marriage.[194] The trial court found that the eleven acts of domestic violence were "roughly proportional" in that both parties were equally culpable.[195] Stuart admitted to another three instances of domestic violence in which he was the sole perpetrator.[196] Additionally, Marla claimed Stuart had committed other acts of domestic violence but Stuart denied the allegations.[197] The trial court granted Stuart sole custody of the children, judging Stuart's "past and present lifestyle" more suitable than that of Marla's.[198] Marla challenged the trial court's findings of fact, asserting it failed to properly evaluate the evidence of domestic violence in its child custody determination.[199]

186. *Id.*
187. *Id.* (citing 41 Am. Jur. 2d *Husband and Wife* § 123 (1995); Coffman v. Adkins, 338 N.W.2d 540, 543 (Iowa Ct. App. 1983); *In re* Estate of Strickland, 149 N.W.2d 344, 354 (Neb. 1967)).
188. *Id.*
189. 560 N.W.2d 219 (N.D. 1997).
190. Heusers v. Heusers, 560 N.W.2d 219, 220 (N.D. 1997).
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 221.
197. *Id.*
198. *Id.*
199. *Id.*

On appeal, the court reiterated the appropriate manner of determining custody when both parents have committed domestic violence.[200] A trial court must measure the extent and amount of domestic violence inflicted by both parents.[201] If the amount and extent of domestic violence perpetrated by one parent is significantly greater than that committed by the other parent, the parent committing the greater acts must rebut the statutory presumption against awarding custody to the perpetrator of domestic violence.[202] However, when the evidence shows that both parents were equally violent, the presumption is not applied to either party.[203]

The trial court found eleven incidents of domestic violence between Stuart and Marla to be "equal in severity," and acknowledged Stuart's admission of three occasions in which only he committed domestic violence.[204] Despite finding that Stuart did indeed commit more domestic violence, the trial court did not apply the presumption against him.[205] The trial court concluded that Marla provoked the three incidences of Stuart's admitted domestic violence and that her provocation served to mitigate Stuart's conduct.[206] Thus, the trial court did not weigh Stuart's three instances of "greater domestic violence" against him and awarded him custody.[207]

The supreme court reversed the trial court, saying it had used an improper standard in measuring Stuart's acts of violence, and remanded the case for an assessment of the domestic violence without mitigation.[208] The court explained that while the trial court did make findings concerning the domestic violence, excusing Stuart's three instances of domestic violence was statutorily impermissible.[209] Moreover, the majority opinion stated that "button pushing" is not a defense to domestic violence

200. *See id.* at 222.

201. *Id.* (citing Krank v. Krank, 529 N.W.2d 844, 850 (N.D. 1995)).

202. *Id.* (citing *Krank*, 529 N.W.2d at 850).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* The trial court found that Stuart's violence in at least three instances was excusable because Marla's actions were provocative. *Id.* The first incident occurred when Marla came home from a bar and told Stuart how the men in the bar were "hitting on her." *Id.* at 221. Stuart got angry, grabbed Marla by the throat, and threw her in the bedroom. *Id.* The second instance occurred when when Stuart accused Marla of taking their son Charlie with her when she went skinny-dipping with another man. *Id.* When Marla returned home, Stuart hit her in the face. *Id.* The third incident occurred at the farm outside Garrison, North Dakota, after Marla returned from town. *Id.* After an argument, Marla told Stuart she was going back to Garrison where she "was appreciated." *Id.* Stuart responded by pushing her out the door. *Id.* Stuart admitted to all three incidents. *Id.* The trial court stated, "Stuart committed domestic violence against Marla on three occasions in which she did not commit domestic violence, after actions by Marla that would have made most reasonable persons commit domestic violence." *Id.* at 222.

208. *Id.*

209. *Id.*

and cannot weigh in the perpetrator's favor.[210] Consequently, Marla's actions did not operate to mitigate or excuse Stuart's acts of violence.[211]

In a concurring opinion, Justice Maring agreed with the majority opinion but wrote to especially emphasize that judges have a duty to perform impartially and in an unbiased manner.[212] Stating that the trial judge used inappropriate language in his memorandum opinion and his findings of fact, Justice Maring found an impermissible appearance of gender bias in the trial court's custody determination.[213] In his dissent, Justice Sandstrom noted that under the current standard, when both parents have engaged in domestic violence, trial courts are required to score the violence "like a boxing match," with the children going to the parent scoring the fewest points.[214] He argued that instead of upholding the trial court by acting in the best interests of the children, the majority simply told the trial court it scored the match incorrectly.[215]

FAMILY LAW—CHILD CUSTODY—DOMESTIC VIOLENCE

KRAFT V. KRAFT

In *Kraft v. Kraft*,[216] Nancy Kraft appealed a district court's amended divorce decree changing custody of her children to Joel Kraft.[217] The North Dakota Supreme Court reversed and remanded to the trial court so that it could make specific findings and because the trial court did not perform the proper legal analysis in a domestic violence case.[218]

Joel and Nancy Kraft were married in 1982, and divorced in 1991, while Joel was serving a five year prison term for drug charges.[219] Nancy got custody of the children by stipulation, and Joel got liberal visitation.[220] In 1995, Joel moved to transfer custody to himself for changed circumstances, alleging that Nancy's live-in boyfriend had a history of abuse.[221] Nancy denied the allegations, claiming that Joel had committed domestic violence during their marriage and should not have

210. *Id.* Self defense is the only permissible mitigating factor in domestic violence cases. *Id.* (citing N.D. CENT. CODE § 14-07.1-01(2) (1991 & Supp. 1995)).

211. *Id.*

212. *Id.* at 223.

213. *Id.* at 224.

214. *Id.*

215. *Id.* Justice Sandstrom believed that the trial court, recognizing serious problems with both Stuart and Marla, correctly decided custody based on the best interests of the children, evaluating all the factors of the best interests statute. *Id.* (citing §14-09-06.2(1)).

216. 554 N.W.2d 657 (N.D. 1996).

217. Kraft v. Kraft, 554 N.W.2d 657, 658 (N.D. 1996).

218. *Id.* at 662.

219. *Id.* at 658.

220. *Id.*

221. *Id.*

custody of the children.[222] After a hearing, the trial court awarded Joel custody but stayed the order so as to not to disrupt the children's living arrangement twice, in the event Nancy's appeal was successful.[223]

The supreme court explained that there are two steps in reaching a child custody determination.[224] First, the trial court must determine whether a significant change in circumstances has occurred since the prior custodial placement.[225] The trial court acknowledged that Joel had made important progress in his rehabilitation toward living a drug and violence free life.[226] In contrast, evidence showed that Nancy's live-in boyfriend was still actively violent and had a significant problem with alcohol.[227] Consequently, the supreme court affirmed the lower court's finding of a significant change in circumstances.[228]

Second, the trial court must determine whether the best interests of the child require that custody be changed.[229] In reviewing the evidence before it, the trial court found that Joel's prior acts of domestic violence did not rise to the level of domestic violence, and did not apply the presumption against him.[230] The supreme court disagreed, stating that sufficient evidence existed to indicate that Joel was in fact a domestic violence perpetrator.[231] Thus, in failing to apply the statutory presumption to Joel, the trial court misapplied child custody law as it pertains to domestic violence.[232] The supreme court reversed the trial court's decision and remanded for the trial court to make specific findings on the application of the statutory presumption against the father.[233] The court also directed the trial court to determine whether the presumption was rebutted by the evidence of Joel's rehabilitation, and to make specific findings about Nancy's boyfriend's ongoing violence in the present custodial household.[234]

222. *Id.* at 659.
223. *Id.* at 662.
224. *Id.* at 659.
225. *Id.* (citing Wetch v. Wetch, 539 N.W.2d 309, 311 (N.D. 1995)).
226. *Id.*
227. *Id.*
228. *Id.* (citing Wenzel v. Wenzel, 469 N.W.2d 156, 157 (N.D. 1991) in which the supreme court held that a situation in which a custodial parent resided with a companion who beat her and caused her child to fear him was a significantly changed circumstance).
229. *Id.*
230. *Id.* at 660.
231. *Id.* at 660-61 (distinguishing Ryan v. Fleming, 533 N.W.2d 920 (N.D. 1995) where the court found that no domestic violence occurred because the acts produced no physical injuries, were isolated and remote in time, and could be characterized as demonstrative).
232. *Id.* at 661.
233. *Id.* at 662.
234. *Id.* The supreme court noted the trial court's reluctance in applying the presumption against the father when the trial court believed it could not apply the same presumption against the live-in boyfriend. *Id.* at 661.

The court acknowledged that on its face, the statute controlling custody placement, section 14-09-06.2, establishes an express presumption against a violent parent, but establishes only an evidentiary factor with no presumption for a person in the home who is not a parent.[235] Disagreeing with the trial court, the supreme court stated that it did not believe that because the factor does not create a presumption, third-party violence becomes only another factor that cannot be used in overcoming the presumption.[236] While the presumption is aimed at protecting both the parent and the child, the factor makes it clear that the child is the more important of the two aims.[237] To remedy the inconsistency, the court stated that a trial court must measure any violence in a child's home against the degree of any earlier violence by the non-custodial parent.[238] Stated differently, the court must determine whether the presumption against placing custody with a parent who has not been violent recently, but has been violent in the past, is overcome by evidence of current violence in the custodial parent's present household.[239] In a correct analysis involving the application of the presumption, a court will weigh which household delivers the greater risk of harm, and additionally, which household best protects the child.[240]

FAMILY LAW—CHILD CUSTODY—DOMESTIC VIOLENCE

TERNES V. TERNES

In *Ternes v. Ternes*,[241] Bergetta Ternes appealed the trial court's judgment awarding custody of their three children to their father and her former-spouse, Larry Ternes, claiming that the trial court erred by not considering evidence of domestic violence.[242] The North Dakota Supreme Court affirmed the trial court, finding that because Bergetta

235. *Id.; see* N.D. CENT. CODE § 14-09-6.2(1) (1991 & Supp. 1995). The presumption is established in § 14-09-06.2(1)(j) and § 14-09-09.2(1)(k) creates the factor. N.D. CENT. CODE § 14-09-6.2(1). Factor (k) states:

> k. The interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interest. The court shall consider that person's history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault, on other persons.

N.D. CENT. CODE § 14-09-09.2(1)(k).

236. *Kraft*, 554 N.W.2d at 661.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 662.

241. 555 N.W.2d 355 (N.D. 1996).

242. Ternes v. Ternes, 555 N.W.2d 355, 355 (N.D. 1996).

failed to raise the issue of domestic violence at trial, the trial court's award of custody to Larry Ternes was not clearly erroneous.[243]

Bergetta and Larry Ternes married in 1983 and had three children.[244] During their marriage, both Bergetta and Larry had extra-marital affairs and bouts with alcohol.[245] In September of 1994, Bergetta asked Larry for a divorce because she was in love with another man.[246] Four days after Bergetta asked Larry for a divorce, Larry staged a suicide attempt in an effort to gain Bergetta's sympathy and attention.[247] Nevertheless, a short time later, Larry, rather than Bergetta, filed for divorce and was granted physical custody of the children pursuant to an interim order.[248] During the period of time the interim order was in effect, the children visited Bergetta in Mandan, where she was residing with her partner.[249] Although Larry never tried to keep the children from seeing Bergetta, Bergetta claimed that Larry would make negative comments about Bergetta's partner to the children.[250]

During the separation, Bergetta and Larry took their oldest daughter to Minneapolis for a medical visit.[251] Throughout their stay in Minneapolis, Bergetta and Larry stayed at different hotels until the last night when they and their daughter all stayed in the same hotel room.[252] Bergetta claimed that while they were staying in the same room together, Larry tried to have sexual intercourse with her.[253] Although Larry denied trying to have sexual intercourse with Bergetta in their hotel room, he did admit to leaving her at a rest area near Alexandria, Minnesota, after they got into an argument on their way home from Minneapolis.[254]

In February of 1996, the trial court made a final judgment on the divorce action.[255] In making the custody determination, the trial court looked at the relevant factors under section 14-09-06.2 of the North Dakota Century Code to determine the best interests of the children.[256]

243. *Id.* at 359.
244. *Id.* at 355.
245. *Id.* at 355-56. However, there was no evidence of physical abuse towards each other or the children as a result of the affairs or the alcohol abuse. *Id.* at 356.
246. *Id.*
247. *Id.*
248. *Id.* The interim order gave Bergetta visitation rights every weekend, required Bergetta to pay $350 per month in child support, and evicted her from their home. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* (quoting N.D. CENT. CODE § 14-09-06.2 (1995)).

The best interest of the child factors in section 14-09-06.2 require that a court look at:

a. The love, affection, and other emotional ties existing between the parents and child.
b. The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the education of the child.
c. The disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
d. The length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity.
e. The permanence, as a family unit, of the existing or proposed custodial home.
f. The moral fitness of the parents.
g. The mental and physical health of the parents.
h. The home, school, and community record of the child.
i. The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
j. Evidence of domestic violence.
k. The interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. The court shall consider that person's history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault, on other persons.
l. The making of false allegations not made in good faith, by one parent against the other, of harm to a child as defined in section 50-25.1-02.
m. Any other factors considered by the court to be relevant to a particular child custody dispute.

The trial court first considered factors a, b, c, and g, and found that both parents were equally able to provide for the best interests of the children.[257] Next, the trial court determined that factors i, j, k, and l were not applicable factors to consider.[258] Finally, the trial court focused on

257. *Id.*
258. *Id.* at 356-57.

factors d, e, f, h, and m, and determined that the children's best interests would be best satisfied if they remained with their father because of the continuity he could provide for them.[259] In addition, although the court found the moral fitness of both parents questionable, the court deemed Bergetta's affair more serious and thus, factor f was weighed in favor of Larry.[260]

The trial court also considered Larry's staged suicide attempt, the negative comments he made to the children regarding Bergetta and her partner, and his leaving Bergetta at the rest area in Minnesota, but concluded that Larry's participation in counseling had resolved some of his behavioral problems.[261] Although the trial court considered Larry's behavior rather insignificant, it was these actions that Bergetta claimed constituted domestic violence on appeal.[262] Finally, the trial court determined that Larry's good performance as caretaker and his successful counseling deemed him the appropriate child custodian.[263] Bergetta appealed the trial court's final judgment, claiming that the trial court erred because it failed to consider domestic violence as a factor.[264]

According to section 14-07.1-01(2) of the North Dakota Century Code, domestic violence includes "physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault, not committed in self-defense, on the complaining family or household members."[265] Thus, on appeal the supreme court determined whether Larry's behavior constituted domestic violence as defined in section 14-07.1-01(2).[266]

In applying the plain language of the statute to Larry's conduct, the court found that although his behavior was reprehensible, it was not immediately apparent that it constituted domestic violence as defined in

259. *Id.* at 357.
260. *Id.*
261. *Id.* at 356-57.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.* at 358 (quoting N.D. CENT. CODE § 14-07.1-01(2) (1995)).
266. *Id.* In custody determinations, the trial court must consider the best interests of the child. *Id.* at 357. When there is credible evidence of domestic violence, however, a rebuttable presumption against awarding custody to the party who perpetrates domestic violence arises. *Id.* at 357-58 (citing Heck v. Reed, 529 N.W.2d 155, 161 (N.D. 1995)). In addition, although the best interest of the child factors should be given equal consideration, when there is evidence of domestic violence, the violence factor will predominate all other factors. *Id.* (citing Swanston v. Swanston, 502 N.W.2d 506, 508 (N.D. 1993) and Ryan v. Fleming, 533 N.W.2d 920, 923 (N.D. 1995)).

It is also important to note that this statute was amended during the 1997 legislative session to provide that in order to constitute domestic violence there must be evidence of a pattern of conduct falling within the definition of domestic violence, rather than a single incident of conduct which constitutes domestic violence.

the statute.[267] Additionally, the court concluded that because Bergetta did not raise the issue of domestic violence at trial, the trial court did not make adequate findings as to whether or not domestic violence occurred.[268] Thus, the court was unable to determine whether the trial court's decision was clearly erroneous.[269]

Finally, the court did note, however, that even when the parties do not raise the issue of domestic violence at trial, trial judges cannot ignore evidence which clearly reveals domestic violence.[270] Further, the court opined that when there is not clear evidence of domestic violence, the party attempting to raise the presumption must do so at the trial level rather than wait until the case is appealed.[271]

FAMILY LAW—CHILD CUSTODY—REMOVAL FROM JURISDICTION

STOUT V. STOUT

In *Stout v. Stout,*[272] Julene Stout appealed from an order denying her permission to move from North Dakota to Arkansas with a minor child.[273] The North Dakota Supreme Court reversed the trial court's decision, reasoning that a court must apply a four-factor analysis in determining whether a change in residence is in a child's best interests.[274]

In 1995, James and Julene Stout divorced.[275] The court awarded primary physical custody of Tell, their minor child, to Julene, and denied her request to move to Arkansas.[276] In March of 1996, Julene moved to change Tell's residence to Arkansas and James resisted.[277] At the time of her motion, Julene made $6.00 an hour with no benefits.[278] She contended her job as an office assistant was being eliminated.[279] In planning her move, Julene secured employment in Arkansas making $8.50 per hour with benefits.[280] She also found an apartment and arranged day-care placement for Tell.[281] In Arkansas, Julene would be

267. *Id.* at 358.
268. *Id.*
269. *Id.* at 358-59.
270. *Id.* at 359.
271. *Id.*
272. 560 N.W.2d 903 (N.D. 1997).
273. Stout v. Stout, 560 N.W.2d 903, 905 (N.D. 1997).
274. *Id.* at 917.
275. *Id.* at 905.
276. *Id.*
277. *Id.* at 906.
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*

close to her family and only two hours from James' parents.[282] Neither Julene nor James had family in North Dakota.[283] The trial court denied Julene's motion.[284]

The trial court reasoned that because James exercised his visitation rights, Julene's move to Arkansas would impede James' and Tell's relationship.[285] The trial court also refused Julene's motion because she was denied a request to move at the time of the divorce.[286] Finally, the trial court held that the benefit of the $2.50 per hour wage increase did not outweigh the benefit of sustaining the physical proximity of James and Tell.[287] The trial court also stated that no change in circumstances warranting a change in residence had taken place.[288]

On appeal, the North Dakota Supreme Court concluded the trial court's decision was clear error based on an erroneous view of the law.[289] The court stated that North Dakota policy dictates the "the best interests of the child" be the primary consideration in determining whether or not a custodial parent may change the residence of the child.[290] The court noted that North Dakota's current child removal statute states that if the noncustodial parent who has visitation rights does not agree to the removal, the custodial parent must seek a court order.[291] The custodial parent must then prove by a preponderance of the evidence that the move is in the best interests of the child.[292] The court then clarified the standards that apply to a petition for removal of a child to another state by the custodial parent when the noncustodial parent refuses to consent.[293]

The court specified that North Dakota trial courts must apply a four-factor analysis to the facts of each case.[294] First, the prospective

282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.* The North Dakota Supreme Court emphasized that motions to relocate are not motions for change of custody. *Id.* at 917. Unlike a motion for change of custody, a motion to relocate does not involve a custody decision. *Id.* The custody decision has been made. *Id.* If a noncustodial parent brings a motion for change of custody in response to a motion to relocate, that parent must first show a significant change in circumstances. *Id.* The noncustodial parent must also prove that the change compels, in the best interests of the child, a change of custody. *Id.* The court stated that to the extent the trial court applied the "change in circumstances" test to the facts in Julene's and James' case, it misapplied the law. *Id.*
289. *Id.* at 906.
290. *Id.* (citing Burich v. Burich, 314 N.W.2d 82, 85 (N.D. 1981)).
291. *Id.* at 907 (citing N.D. CENT. CODE § 14-09-07 (1991)).
292. *Id.* (citing Olson v. Olson, 361 N.W.2d 249, 252 (N.D. 1985)).
293. *Id.* at 912-14.
294. *Id.* at 913. The court stated that it does not endorse the view that a request to leave the jurisdiction should be presumptively approved, or subscribe to a presumption against the right of a custodial parent to remove a minor child. *Id.*

advantages of the move in improving the custodial parent's and child's quality of life must be considered.[295] Second, courts must evaluate the integrity of the custodial parent's motive for relocation and consider whether it is to defeat or deter visitation by the noncustodial parent.[296] Third, courts must weigh the integrity of the noncustodial parent's motives for opposing the move.[297] Finally, courts must determine whether, given relocation, there is a realistic opportunity for visitation that preserves the noncustodial parent's relationship with the child, as well as the likelihood that each parent will comply with such a visitation.[298] The primary concern in applying the factors is still the best interests of the child.[299]

In applying the four-factor analysis to Julene's request, the court found that Julene would gain substantial benefits by moving to Arkansas with Tell.[300] The benefits were not merely a $2.50 hourly raise, but also included working at a job with benefits such as health insurance, paid vacation, sick leave, retirement, opportunity to advance, other non-economic benefits, and a network of close family members.[301] Second, the court found no evidence that Julene's motives were other than to be close to her family and pursue her career.[302] Along these lines, Julene made living arrangements for herself and Tell, found a child-care placement, and took all reasonable steps to secure a stable life for herself and Tell.[303] Third, the court found nothing in the record indicating James' motives were anything other than concern for his relationship with Tell.[304] Finally, the court analyzed whether opportunities for alternative visitation existed and the likelihood that each parent would comply with such visitation.[305] The court found that visitation opportunities existed and that both parties were likely to comply.[306] Finding that most of the

295. *Id.* The court emphasized that lower courts must not limit their analysis to the enhanced economic opportunities of the custodial parent when considering prospective advantages. *Id.* at 914. Rather, a court should assess less tangible benefits of relocation as well. *Id.* Less tangible benefits cited by the court for consideration include a desire to be close to extended family, ability to pursue educational opportunities, or seek an improved physical and emotional environment in which to raise the minor child. *Id.*

296. *Id.* at 913.

297. *Id.*

298. *Id.* The court agreed with the opinion in D'Onofrio v. D'Onofrio, 365 A.2d 27, 29 (N.J. Super. Ct. Ch. Div. 1976). *Id.* at 914. The *Donofrio* court stated that a noncustodial parent's visitation should not trump the custodial parent's desire to seek a better life where reasonable alternative visitation is available and where the advantages of the move are substantial. *Id.* (citing *D'Onofrio*, 365 A.2d at 30).

299. *Id.* at 913.

300. *Id.* at 915-16.

301. *Id.* at 915.

302. *Id.* at 916.

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

factors weighed in Julene's favor, the court reversed and remanded the case to the trial court so that it could establish an appropriate visitation schedule based on Julene's relocation.[307]

In his concurrence, Justice Neumann agreed that the majority's standard was an important step toward more uniform dispute resolution.[308] However, Justice Neumann dissented on the issue of findings, arguing instead for remand to the trial court and reconsideration under the more specific standard.[309] Justice Sandstrom also dissented, stating that because the trial court applied a best interests analysis under the existing law of the state, its decision should be affirmed.[310] Justice Sandstrom argued that the majority's ruling supplanted North Dakota case law holding that minor children are entitled to the love and companionship of both their parents.[311] Additionally, Justice Sandstrom argued that the majority's decision undermined the legislative intent of North Dakota's statute governing the removal of minor children.[312] Finally, Justice Sandstrom declared that the majority opinion contravened established case law on child visitation and custody and stated that he would affirm the trial court.[313]

FAMILY LAW—CHILD CUSTODY AND VISITATION

KLUCK V. KLUCK

In *Kluck v. Kluck*,[314] Marcia Kluck appealed a divorce decree placing custody of their two children with Roger Kluck, dividing marital property, and ordering child and spousal support.[315] Marcia suffered from a mental illness, and in December of 1994, Roger sued for divorce.[316] The trial court's interim order gave temporary custody of the children and use of the family home to Roger.[317] When Marcia continuously filed groundless child abuse reports against Roger during the temporary custody period, the trial court held Marcia in contempt.[318]

After trial, the court found both parties had committed domestic violence but that Marcia's commission was substantially greater.[319]

307. *Id.* at 917.
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.* (citing Gardebring v. Rizzo, 269 N.W.2d 104, 110 (N.D. 1978)).
312. *Id.* at 917-18 (citing N.D. CENT. CODE § 14-09-07 (1991)).
313. *Id.* at 920.
314. 561 N.W.2d 263 (N.D. 1997).
315. Kluck v. Kluck, 561 N.W.2d 263, 265 (N.D. 1997).
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.* at 265-66.

Applying the statutory presumption against placing custody with the perpetrator of domestic violence, the court awarded Roger custody of the children.[320] Marcia was granted supervised visitation.[321] The court also divided the marital property, ordered Roger to pay spousal support, and ordered Marcia to pay child support.[322] Marcia argued six issues on appeal.[323]

Marcia first argued that the trial court erred in allowing the testimony of the psychologist who had conducted a custody evaluation as was required by state law.[324] Marcia contended that the psychologist was not qualified to give an opinion on child custody because he was not licensed in North Dakota and his education and training were in adult clinical psychology, not child psychology.[325] The court explained that the North Dakota Rules of Evidence[326] do not require licensure in a particular field, only that the expert have knowledge, training, education, and experience helpful to the trier of fact.[327] The court held that an educated and experienced psychologist should be able to qualify as an expert in order to testify about child custody factors.[328]

The court also found that Marcia's objections to the custody report and to the psychologist's qualifications "came too late."[329] Marcia stipulated that the psychologist would perform the custody evaluation in April 1995; the report was filed in June 1995; but Marcia made no objections until trial in September 1995.[330] Marcia also contended that the psychologist was unfamiliar with the statutory factors affecting custody determinations, had a potential conflict of interest, and was biased against her.[331] The court held that while these aspects may have affected the weight of the expert's opinion, they went to the expert's credibility, not to the admissibility of the evidence.[332] The court concluded that the trial court did not abuse its discretion in allowing the psychologist to render expert testimony on custody.[333]

Second, Marcia argued the trial court erred in finding that her acts of domestic violence were greater than those of Roger.[334] The court

320. *Id.* at 266 (citing N.D. CENT. CODE § 14-09-06.2(1)(j) (1991 & Supp. 1995)).
321. *Id.*
322. *Id.*
323. *Id.* at 266-73.
324. *Id.*
325. *Id.*
326. *Id.* (citing N.D. R. EVID. 702).
327. *Id.*
328. *Id.*
329. *Id.* at 266-67.
330. *Id.*
331. *Id.* at 267.
332. *Id.*
333. *Id.*
334. *Id.*

disagreed, explaining that where credible evidence of domestic violence exists in a child custody dispute, a statutory presumption operates against awarding custody to the more violent parent.[335] Confronted with conflicting testimony on the specifics and proportionality of the violence, the trial court found Roger more credible than Marcia, thus triggering the presumption against her.[336] The court concluded that the trial court's finding that Marcia's conduct was more violent than Roger's was not clearly erroneous.[337]

Third, Marcia asserted that the trial court erred in allowing her only supervised visitation with the children.[338] The court explained that where a noncustodial parent has perpetrated domestic violence, only supervised child visitation with that parent is permissible unless there is clear and convincing evidence that unsupervised visitation would not be detrimental to the child.[339] Marcia challenged the trial court's finding that her conduct put the children's welfare at risk by asserting that "there was no reasonably certain expert testimony that Marcia was harmful to the children."[340] Finding that Marcia failed to submit clear and convincing evidence that unsupervised visitation would not endanger the well-being of the children, the court upheld the trial court's finding that supervised visitation was necessary.[341]

Finally, Marcia argued that the trial court erred by including certain assets and debts in the marital division, erred in not valuing Roger's ownership share in a professional engineering corporation, and erred by inequitably distributing the property.[342] The court found the Workers' Compensation Bureau's suspension of any future benefits for Roger, until he incurred additional covered losses, did not warrant allocating a debt in that amount to Roger during division of the marital estate.[343] Roger's potential responsibility for future medical expenses or disability was found to be speculative.[344] Thus, the court concluded that potential future responsibility for the costs of possible changes in Roger's health, foreshadowed by suspension of a specific amount of future benefits, did not create present marital debt for purposes of allocating the marital estate.[345]

335. *Id.* (citing N.D. CENT. CODE § 14-09-06.2(1)(j) (1991 & Supp. 1995)).
336. *Id.* at 268.
337. *Id.*
338. *Id.*
339. *Id.* (citing N.D. CENT. CODE § 14-05-22(3) (1991)).
340. *Id.*
341. *Id.* at 269.
342. *Id.* at 268-73.
343. *Id.* at 269-70.
344. *Id.* at 270.
345. *Id.*

Marcia argued that including a previously received lump-sum social security disability check as a marital asset violated the anti-alienation section of the Social Security Act.[346] Overturning the trial court, the court held that the anti-alienation section of the Social Security Act[347] prohibits counting social security benefits previously paid to a divorcing spouse, as well as future benefits, as marital assets in calculating a division of the marital estate.[348]

Finally, Marcia challenged the trial court's finding that there was no value in Roger's ten percent ownership of Wold Engineering, Inc., his employer.[349] The court addressed several issues concerning the valuation of Wold Engineering. The court found the financial report representing the value of Wold Engineering and Roger's shares was not accurate and did not support the trial court's decision not to value Roger's ten percent ownership.[350] Evidence showed that the use of depreciated asset values in the financial report did not reflect the actual market value of those assets.[351] Wold's president testified that the financial reports contained figures that were merely "accounting practices" and that property and equipment were significantly undervalued.[352] The court also found the absence of accounts receivable on the financial report of a firm with more than a million dollars in revenue to be indicative of a valuation problem.[353] Further, Marcia argued that Roger's guaranteed $46,000 buy-out agreement with Wold indicated substantively that the shares did in fact have value.[354] Roger contended that a corporate buy-out agreement did not evidence the value of a shareholder's ownership.[355] The court found that since the buy-out agreement contained no contingencies or speculative amounts, it was really an open offer to buy back Roger's shares at a minimum of one year's salary, and as such, had value.[356]

The court concluded that because the trial court used an inaccurate financial report to value Roger's shares in Wold, failed to include any amount for accounts receivable, and ignored evidence of a buy-out

346. *Id.*

347. 42 U.S.C. § 407 (1991).

348. *Kluck*, 561 N.W.2d at 270-71 (citing Philpott v. Essex County Welfare Bd., 409 U.S. 413 (1973)).

349. *Id.* at 271.

350. *Id.* at 272 (citing Fraase v. Fraase, 325 N.W.2d 271, 275 (N.D. 1982) (affirming a trial court's refusal to accept a financial statement that valued assets at depreciated cost, where the valuation was an "accounting valuation" that did not reflect the true value of the physical assets)).

351. *Id.*

352. *Id.*

353. *Id.* (citing *Fraase*, 315 N.W.2d at 275 (holding that a trial court must include accounts receivable in valuing professional corporation)).

354. *Id.*

355. *Id.* (citing Sanford v. Sanford, 301 N.W.2d 118, 125 (N.D. 1980)).

356. *Id.* at 272.

agreement that guaranteed Roger $46,000 for his company ownership, a mistake had been made.[357] Since the trial court's error in valuation and division of property significantly affected the equities of the property distribution, the court remanded for redetermination.[358] Additionally, to the extent that changes in the property distribution necessitated other financial changes in the divorce decree, the court ordered a redetermination of child support, spousal support, transportation costs for visitation, and attorneys fees.[359]

FAMILY LAW—CHILD SUPPORT

BOTNER V. BOTNER

The case of *Botner v. Botner*[360] involved a divorce decree in which the parents agreed to pay the college expenses of their children.[361] William and Rosalie Botner were divorced in 1978.[362] At the time of the divorce they had three children, Chad, Corey, and Collin, ages twelve, eight, and seven, respectively.[363] William and Rosalie made an agreement which was incorporated into the divorce decree.[364] The agreement stated in part that "[t]he parties, recognizing the importance of higher learning, do hereby mutually agree to share the financial responsibility, to the best of their ability, should any child or children of the parties desire to actively pursue a college education."[365] In 1993, Corey Botner, who was then a junior at the University of North Dakota, brought an action against his father, William, to enforce the education clause of the divorce decree.[366] William denied any obligation to pay Corey's college expenses, claiming the education clause of the divorce decree was unenforceable as a contract because it did not meet the statute of frauds and was too vague.[367] He also filed a third-party complaint against Rosalie, claiming he had paid her $25,000 in satisfaction of his child support obligations and also asserting a claim for reimbursement from her in the event the court ordered him to pay for Corey's college expenses.[368]

357. *Id.* at 272-73.
358. *Id.* at 273.
359. *Id.*
360. 545 N.W.2d 188 (N.D. 1996).
361. Botner v. Botner, 545 N.W.2d 188, 189 (N.D. 1996).
362. *Id.* at 189.
363. *Id.*
364. *Id.*
365. *Id.* (quoting clause 12 of the divorce decree).
366. *Id.*
367. *Id.* at 189-90.
368. *Id.* at 189.

Corey filed a motion for summary judgment and the trial court issued a partial summary judgment, stating that William and Rosalie were obligated to pay, to the best of their abilities, for Corey's college expenses.[369] The trial court, after conducting an evidentiary hearing, awarded Corey a judgment against his father in the amount of $28,956.83 plus costs and attorney's fees, and against his mother in the amount of $6,167.61.[370] The trial court further declared that Rosalie had already satisfied her obligation and therefore did not have to pay the judgment.[371] William appealed.[372]

The North Dakota Supreme Court, quoting *Sullivan v. Quist*,[373] stated that "a settlement agreement that is wholly incorporated into the divorce judgment is merged into that judgment and ceases to be independently viable or enforceable. . . . Once the settlement agreement is merged into the divorce decree, it is interpreted and enforced as a final judgment of the court, not as a separate contract between the parties."[374] The court next stated that a judgment is a question of law for the court and therefore, de novo review applied.[375] The court concluded that the education clause of the divorce decree was unambiguous, and aside from the fact that the trial court improperly applied a contract analysis and assigned an incorrect reason for its decision, the ultimate conclusion was correct.[376]

The North Dakota Supreme Court reviewed the evidentiary hearing conducted by the trial court, stating that it will not overturn the trial court's findings of fact unless they are clearly erroneous.[377] The court found that the trial court's findings of fact were supported by the evidence and therefore concluded that they were not clearly erroneous.[378]

William asserted on appeal that the trial court erred in denying his request for a jury trial.[379] The North Dakota Supreme Court stated that William's argument was based on the mistaken belief that he had a contract action and therefore concluded the trial court did not err in denying the request for a jury trial.[380] Finally, William asserted that his obligation to pay Corey's education expenses was satisfied by the lump sum payment of $25,000 to Rosalie in 1991.[381] The court found that the

369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.*
373. 506 N.W.2d 394 (N.D. 1993).
374. *Botner*, 545 N.W.2d at 190 (citations omitted).
375. *Id.*
376. *Id.*
377. *Id.* at 191.
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.*

child support obligations and education expense obligations were separate and independent provisions, and concluded that the 1991 lump sum payment to Rosalie only satisfied the child support provisions of the divorce decree.[382] The court stated that William's argument had no merit because in the 1991 satisfaction agreement, there was no reference to anything other than alimony and child support payments and therefore the obligation to pay for college expenses remained.[383] The trial court, as part of the judgment, declared William's obligation to pay the college expenses was not dischargeable in bankruptcy.[384] Since William had not informed the North Dakota Supreme Court of any pending bankruptcy action, they declined review of the issue.[385]

Chief Justice VandeWalle concurred, but stated that had Corey's standing to sue for enforcement of the divorce decree been challenged, there might have been a different result in this case.[386] He stated that a divorce decree is between the parents, not the children and that the right to enforcement of the divorce decree was Rosalie's.[387] Justice VandeWalle said Corey was nothing more than a third-party beneficiary to the divorce judgment and that "third-party beneficiary" is a contract concept.[388] Justice VandeWalle was concerned that the majority's opinion would invite creditors or others who claim an interest in the divorce decree to bring actions to enforce it.[389]

FAMILY LAW—CHILD SUPPORT—IMPUTING INCOME

NELSON V. NELSON

In *Nelson v. Nelson*,[390] Jody Lynn Nelson, now known as Jody Lynn Novak, appealed from an order of the district court decreasing the child support payments her former husband, Keith Michael Nelson, was required to pay.[391] The North Dakota Supreme Court held that: (1) the underemployment support guideline promulgated by the North Dakota Department of Human Services does not conflict with the statute authorizing the department to set child support guidelines;[392] (2) imputing income to a significantly underemployed obligor is a proper use of

382. *Id.*
383. *Id.*
384. *Id.*
385. *Id.*
386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.* at 192.
390. 547 N.W.2d 741 (N.D. 1996).
391. Nelson v. Nelson, 547 N.W.2d 741, 743 (N.D. 1996).
392. *Id.* at 745.

judicial discretion;[393] (3) a parent has a duty to support his children beyond his personal inclinations[394] and however; (4) it was not clearly erroneous for the district court to find that evidence presented was insufficient to establish the prevailing wage for Keith's occupation or that he was underemployed.[395]

Jody and Keith were married in May of 1981 and had two children.[396] They divorced in January of 1992.[397] The divorce decree granted custody of the children to Jody, ordered Keith to pay monthly child support, and was later amended when Keith agreed to increase his support payment to $568 monthly.[398] Prior to the divorce, Keith worked as an installer for an overhead door company.[399] About June 1992, Keith left his employer to work for another overhead door company.[400] In June 1993, Keith left his job, this time to start his own overhead door business.[401] After incurring a significant reduction in his income over two years, in June of 1994, Keith filed bankruptcy.[402]

In January of 1995, Keith moved to reduce his child support obligation.[403] Jody resisted, arguing that Keith's income reduction was self-induced and only temporary.[404] After comparing Keith's 1994 hourly income to his 1991 hourly wage, Jody argued that Keith was underemployed and that the court should apply the North Dakota underemployed child support guideline.[405] Jody asked the court, upon modification of Keith's obligation, to impute more income to him.[406]

After an evidentiary hearing, the trial court concluded that the underemployment guideline did not apply because Keith was not underemployed, but rather, self-employed.[407] The trial court further found that the underemployment guideline was unreasonable, unnecessary, not required by federal law, and that a court should not impute income unless an obligor's voluntary change of employment is not "reasonable under all of the circumstances."[408] Additionally, even if the underemployment guideline were applied, the trial court found that

393. *Id.* at 746.
394. *Id.*
395. *Id.* at 747.
396. *Id.* at 743.
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.*
404. *Id.*
405. *Id.* (citing N.D. ADMIN. CODE § 75-02-04.1-07).
406. *Id.*
407. *Id.*
408. *Id.*

Jody failed to present sufficient evidence of the prevailing wage in the community based on Keith's work history and qualifications.[409] Thus, the trial court reduced Keith's child support obligation.[410] Jody appealed.[411]

On appeal, Jody argued that the trial court erred in granting Keith a modification of his child support obligation because Keith's reduction in income was both voluntary and temporary.[412] The North Dakota Supreme Court disagreed, stating that a voluntary change of employment resulting in a reduction of income does not, by itself, enjoin an obligor from seeking modification of a child support obligation.[413] An obligor only has to demonstrate a material change in circumstances to seek modification of a child support order within one year after its entry.[414] If the obligor properly seeks to modify the order after one year, the trial court must modify the obligation to conform to the amount of child support required under the child support guidelines.[415] The court concluded that because Keith's support order was over one year old, he was not precluded from seeking modification.[416] Rather, he was statutorily entitled to a periodic review of his child support obligation and the application of the guidelines to his present income, due to a voluntary change of employment, would reduce his support obligation.[417]

Jody also urged that rather than granting Keith a permanent reduction in child support, the court should grant him a temporary delay in making support payments.[418] The court agreed, explaining that when the obligor is temporarily unable to pay the obligation, the better course of action is often to defer part of the support payments, rather than reducing the obligation.[419] However, given the length and extent of the reduction in Keith's income, the court found the trial court was not clearly erroneous in granting a modification of the support order instead of payment deferral.[420]

409. *Id.*
410. *Id.*
411. *Id.*
412. *Id.* at 744.
413. *Id.*
414. *Id.* (citing N.D. CENT. CODE § 14-09-08.4(3) (1993 & Supp. 1997); Mahoney v. Mahoney, 538 N.W.2d 189, 191-92 (N.D. 1995)).
415. *Id.* (citing N.D. CENT. CODE § 14-09-08.4(3) (1993 & Supp. 1997)).
416. *Id.*
417. *Id.* (citing Eklund v. Eklund, 538 N.W.2d 182, 185-186 (N.D. 1995) (stating the legislature has authorized and directed a periodic review of all child support orders); Garbe v. Garbe, 467 N.W.2d 740, 742-43 (N.D. 1991)).
418. *Id.* (citing Nelson v. Nelson, 547 N.W.2d 741, 744 (N.D. 1996)).
419. *Id.*
420. *Id.*

Jody argued that the trial court erred in declaring the underemployed child support guideline unreasonable.[421] The court agreed with Jody finding the child support guideline remedy for underemployment was a reasonable exercise of the rule-making authority of the Department of Human Services.[422] Because an obligor's ability to pay is not based exclusively on his actual income, earning capacity may be also utilized in assessing an obligor's ability to pay child support.[423] Further, the amended unemployment child support guideline falls within the scope of the statute authorizing the Department of Human Services to establish child support guidelines.[424] The court also found that the Department of Human Services did not act "arbitrarily or capriciously" in defining "community" as any place within 100 miles of the obligor's residence.[425]

Rejecting the trial court's complaint that application of the underemployment guideline infringes upon judicial discretion, the court stated that imputing income to a significantly underemployed child support obligor is a proper use of judicial discretion and does not obstruct the administration of justice.[426] Furthermore, the court explained that an obligor is presumed to be underemployed if the obligor is earning less than sixty percent of the relevant prevailing wage in the community, but the presumption is rebuttable and may be overcome by evidence.[427] Finally, the court stated that imputing income to an underemployed obligor is not unjust because a parent has a duty to support his children "to the best of his abilities, not simply to his inclinations."[428] Thus, the parent who changes jobs or becomes self-employed, with a resulting reduction in income, should bear the cost or his employment decision, not the children.[429]

421. *Id.* (referring to N.D. ADMIN. CODE § 75-02-04.1-07).

422. *Id.* (referring to N.D. ADMIN. CODE § 75-02-04.1-07).

423. *Id.* (citing Gable v. Gable, 434 N.W.2d 722, 724 (N.D. 1989); Cook v. Cook, 364 N.W.2d 74, 76 (N.D. 1985); Burrell v. Burrell, 359 N.W.2d 381, 383 (N.D. 1985); Skoglund v. Skoglund, 333 N.W.2d 795, 796 (N.D. 1983); Perry v. Perry, 382 N.W.2d 628, 629 (N.D. 1986) (holding that an obligor who "could seek and maintain employment which would allow him to meet his obligation for child support," could be held in contempt for failure to pay)).

424. *Id.* at 745 (citing Little v. Tracy, 497 N.W.2d 700, 704 (N.D. 1993); Spilovoy v. Spilovoy, 488 N.W.2d 873, 878 (N.D. 1978) ("If a minimum wage income should be imputed to a child support obligor under these circumstances, that argument is best made to the agency promulgating the guidelines and, if failing there, to the Legislature")).

425. *Id.* (citing N.D. CENT. CODE § 28-32-19.1(4) (1991); Ames v. Rose Township Bd. of Township Supervisors, 502 N.W.2d 845, 851 (N.D. 1993)).

426. *Id.* at 746.

427. *Id.* (citing N.D. R. EVID. 301 (stating that a presumption is rebuttable and may be overcome by contrary evidence weighed by a judge); N.D. ADMIN. CODE § 75-02-04.1-07(2) (stating that an obligor is only to be presumed underemployed if he or she is earning less than sixty percent of the relevant prevailing wage in the community)).

428. *Id.*

429. *Id.*

Keith argued that even if the child support underemployment guideline is upheld, a self-employed obligor cannot be "underemployed" for purposes of imputing income, especially in his case, since he continually looked for work.[430] The court disagreed stating that the child support guideline definition of "underemployment" is based on an obligor's earning capacity, rather than the amount of time that the obligor works.[431] However, the court did agreed with Keith that the modification must be affirmed because the trial court found that even if the guideline applied, that Jody failed to present sufficient evidence proving Keith earned "significantly less than prevailing amounts earned" by similarly situated persons.[432] The court upheld the trial court's finding that Jody's evidence was insufficient to prove Keith's underemployment.[433]

The supreme court concluded that while it was clearly erroneous for the trial court to find the underemployment child support guideline "inappropriate and unreasonable," it was not clearly erroneous for court to find that Jody failed to present sufficient evidence of the prevailing wage in the community.[434] Consequently, even under the underemployment child support guideline, the trial court properly refused to impute income to Keith.[435]

Chief Justice VandeWalle concurred in the result, but noted that under the guidelines, an obligor with a job that pays more than the prevailing wage in the community may leave that job for one that pays less, without consequence, so long as the job the obligor takes is at the prevailing community wage.[436] Chief Justice VandeWalle also noted of Keith's underemployment that the child unjustly pays for the parent's choices when, because of the modification, the obligor's child support payments are reduced.

FAMILY LAW—DIVORCE—PROPERTY

RIDLEY V. METROPOLITAN FEDERAL BANK

In *Ridley v. Metropolitan Federal Bank*,[437] Geraldine Ridley, the divorced former-spouse of the decedent, Donald Ridley, appealed the

430. *Id.*

431. *Id.* (citing N.D. ADMIN. CODE 75-02-04.1-07(1)(b), which allows a court to impute income to a self-employed obligor if that obligor's income is significantly less than the prevailing amount earned in the community by a person with similar work history and occupational qualifications).

432. *Id.* (stating that under N.D. ADMIN. CODE 75-02-04.1-07(1)(b), Jody failed to present sufficient evidence to prove that Keith earned significantly less than the prevailing wage earned by similarly situated persons).

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

437. 544 N.W.2d 867 (N.D. 1996).

district court's award of the proceeds of two IRA accounts and a bank account to Donald's estate.[438] The North Dakota Supreme Court affirmed the district court, concluding that the divorce decree, which gave the bank accounts and the IRAs to Donald "free of any interest" of Geraldine, nullified the earlier contractual designations of survivorship rights to Geraldine.[439]

Donald and Geraldine were married in March of 1984.[440] Prior to their marriage, Donald opened two IRA accounts at Metropolitan Federal Bank.[441] After Donald and Geraldine married, Donald designated Geraldine as the beneficiary on both of the IRA accounts.[442] Additionally, Donald and Geraldine opened a joint bank account at First Bank in Langdon.[443] In October of 1990, Donald and Geraldine divorced.[444] One clause of the divorce decree provided that "each party shall own free of any interest of the other all savings accounts, checking accounts and every other asset of every nature, kind and description either owned by them prior to the marriage or that is now in the respective individual's name."[445]

As a result of the decreed division of property, Donald received the IRA accounts and the joint bank account, however, Donald never changed the beneficiary designations on any of the accounts.[446] When Donald died in August of 1994, his estate sought the proceeds of all three accounts.[447] Although First Bank of Langdon turned over the proceeds of the joint bank account, Metropolitan Federal Bank refused to do the same until a determination was made as to who had the rights to the accounts.[448] After Donald's estate petitioned the district court to determine the rights to the accounts, Geraldine counterclaimed for the proceeds of the joint bank account and the IRA accounts as the surviving beneficiary.[449] The district court, relying on the clause in the divorce decree stating that the party receiving the accounts would receive them "free of any interest of the other," concluded that "any interest" included Geraldine's inchoate survivorship interest in all three accounts, and thus awarded all of the accounts to Donald's estate.[450]

438. Ridley v. Metropolitan Fed. Bank, 544 N.W.2d 867, 868 (N.D. 1996).
439. *Id.*
440. *Id.* at 867.
441. *Id.*
442. *Id.* at 868.
443. *Id.*
444. *Id.*
445. *Id.*
446. *Id.*
447. *Id.*
448. *Id.*
449. *Id.*
450. *Id.*

Geraldine appealed the district court's decision claiming that because Donald did not remove her as the designated beneficiary on the accounts during his lifetime, she succeeded to those accounts upon his death.[451] In finding that the divorce decree nullified Geraldine's survivorship rights to the accounts, the North Dakota Supreme Court looked to prior case law and reiterated its analysis of nonprobate transfers on death.[452] The Court looked to *Nunn v. Equitable Life Assurance Society*[453] and concluded that a "beneficiary's rights in an insurance policy are not affected by a divorce between the beneficiary and insured, but . . . a beneficiary may still contract away an interest in the policy through a settlement agreement even if the beneficiary is not formally changed."[454] Accordingly, the court affirmed the district court's finding that Geraldine had contracted away her right of survivorship to the accounts when she entered into the stipulation for division of property in the divorce decree.[455]

INFANTS—CRIMES

IN RE A.E.

In *In re A.E.*,[456] A.E. and five other juveniles were arrested after the murder of Cheryl Tendeland in West Fargo, North Dakota on November 15, 1995.[457] A petition was filed in Cass County Juvenile Court alleging that A.E. was a delinquent child because he conspired to commit armed robbery in connection with the Tendeland incident.[458] The State filed a motion to transfer jurisdiction to Cass County District Court and after a hearing, the court granted the motion.[459]

A.E. appealed two issues.[460] First, A.E. argued that the State did not meet its burden of persuasion on the question of whether there existed reasonable grounds to believe he conspired to commit armed robbery.[461] Second, A.E. argued that the State failed to meet its burden of persuasion in proving that he was not amenable to treatment as a juvenile.[462]

451. *Id.*
452. *Id.*
453. 272 N.W.2d 780 (N.D. 1978).
454. *Ridley*, 544 N.W.2d at 868 (citing Nunn v. Equitable Life Assurance Soc'y, 272 N.W.2d 780 (N.D. 1989)). The supreme court also noted that in analyzing cases dealing with nonprobate transfers on death, contract law usually controls the survivorship rights of a designee of an interest in accounts. *Id.* at 869.
455. *Id.* at 869.
456. 559 N.W.2d 215 (N.D. 1997).
457. *In re* A.E., 559 N.W.2d 215, 216 (N.D. 1997).
458. *Id.* at 216.
459. *Id.*
460. *Id.*
461. *Id.*
462. *Id.*

On appeal, the North Dakota Supreme Court reviewed the juvenile court's application of North Dakota's transfer statute which contains three sections.[463] Section one authorizes, for prosecution purposes, the transfer of certain offenses from juvenile court to the district court before hearing the case, provided that reasonable grounds exist to believe that the child committed the act or is not amenable to treatment or rehabilitation.[464] Section two[465] shifts the burden of persuasion in proving amenability to treatment or rehabilitation from the state to the

463. *Id.* at 216-19 (citing N.D. CENT. CODE § 27-20-34 (Supp. 1997)).

464. N.D. CENT. CODE § 27-20-34(1)(c). The statute authorizes the transfer of some offenses from juvenile court to the district court for prosecution, providing in part:

> 1. After a petition has been filed alleging delinquency based on conduct which is designated a crime or public offense . . . the court before hearing the petition on its merits shall transfer the offense for prosecution to the appropriate court having jurisdiction of the offense if:
>
> . . .
>
> c. (1) The child was fourteen or more years of age at the time of the alleged conduct;
> (2) A hearing on whether the transfer should be made is held in conformity with sections 27-20-24, 27-20-26, and 27-20-27;
> (3) Notice in writing of the time, place, and purpose of the hearing is given to the child and the child's parents, guardian, or other custodian at least three days before the hearing; and
> (4) The court finds that there are reasonable grounds to believe that:
> (a) The child committed the delinquent act alleged;
> (b) The child is not amenable to treatment or rehabilitation as a juvenile through available programs;
> (c) The child is not treatable in an institution for the mentally retarded or mentally ill;
> (d) The interests of the community require that the child be placed under legal restraint or discipline; and
> (e) If the child is fourteen or fifteen years old, the child committed a delinquent act involving the infliction or threat of serious bodily harm.

Id.

465. *A.E.*, 559 N.W.2d at 217. In 1995, the North Dakota Legislature enacted amendments to N.D. CENT. CODE § 27-20-34. *Id.* (citing 1995 N.D. Laws ch. 124, sec. 15). One of the 1995 amendments to the transfer statute was codified as N.D. CENT. CODE § 27-20-34(2), which provides:

> (2) The burden of proving reasonable grounds to believe that a child is amenable to treatment or rehabilitation as a juvenile through available programs is on the child in those cases in which the alleged delinquent act involves the offense of manslaughter, aggravated assault, robbery, arson involving an inhabited structure, or escape involving the use of a firearm, destructive device, or other dangerous weapon or in those cases where the alleged delinquent act involves an offense which if committed by an adult would be a felony and the child has two or more previous delinquency adjudications for offenses which would be a felony if committed by an adult.

Id. at 217-18 (citing § 27-20-34(2)).

child, while section three sets forth the factors a court must consider in determining a child's amenability to treatment.[466]

In addressing the first issue, the court found the State met its burden of persuasion and established reasonable grounds to believe A.E. committed the delinquent act of conspiracy to commit armed robbery.[467] At the transfer hearing, the trial court heard testimony from a Fargo police detective that A.E. was present in the vehicle when Cheryl Tendeland was shot to death, was present the night before when his companions robbed occupants of another car at gunpoint, and was present when the spoils from that robbery were divided.[468] The court agreed with the trial court's conclusion that based on the evidence, the State had reasonable grounds to believe that A.E. committed the offense of conspiracy to commit armed robbery.[469]

In addressing the second issue, the supreme court prefaced its holding by explaining that the transfer statute contained a codification that effectively transferred the burden of persuasion from the State to the child in issues of amenability to treatment or rehabilitation.[470] Consequently, A.E. was required to prove that he could be rehabilitated.[471] A.E. relied only upon the North Dakota Youth Correction Center's (NDYCC) report, the purpose of which was to determine A.E.'s amenability to treatment.[472] The author of the report was unable to assert "absolutely and categorically" that A.E. was not amenable to treatment because he had not been involved in any "specific treatment programs on a protracted basis."[473] The report also contained information that could be construed as indicating potential for A.E.'s rehabilitation.[474]

Conversely, the State emphasized the report's overall conclusion that A.E. was not amenable to treatment as juvenile.[475] The State argued that assessing individual components, instead of the whole report, did not

466. *Id.* at 218. The transfer statute states the factors that the court shall consider and make findings on in determining a child's amenability to treatment and rehabilitation. *Id.* These factors include:

> [A]ge, mental capacity, maturity, degree of criminal sophistication exhibited, previous record, success or failure of previous attempts to rehabilitate, whether the juvenile can be rehabilitated prior to expiration of juvenile court jurisdiction, any psychological, probation, or institutional reports, the nature and circumstances of the acts for which the transfer is sought, the prospect for adequate protection of the public, and any other relevant factors.

Id. (citing § 27-20-34(3)).

467. *Id.* at 217.

468. *Id.*

469. *Id.*

470. *Id.* at 218.

471. *Id.*

472. *Id.*

473. *Id.* at 219.

474. *See id.*

475. *Id.*

provide an accurate picture of A.E.'s amenability to treatment.[476] The court affirmed the juvenile court finding that A.E. did not meet his burden of persuasion by showing reasonable grounds to believe that he was amenable to treatment or rehabilitation as a juvenile through available programs.[477]

The North Dakota Supreme Court expressed concern over instances in which the State and the child rely on the same report in treatment amenability cases.[478] The court stated that a child needs an expert witness who "will study, evaluate, and visit with the child enough" to offer answers to important questions.[479] Moreover, the child's expert witness should be knowledgeable of statutory requirements and the critical elements of the opinion he or she must give in order for the child to prevail.[480] The court further noted that in a different case, one in which other evidence was offered, the NDYCC report would not necessarily be controlling.[481]

Justice Sandstrom concurred, stating that he agreed with the majority but noted that there can be reasonable grounds, or probable cause, to believe something both is and is not the case.[482] Consequently, when the other factors are met, if there is substantial evidence both of amenability to treatment and of non-amenability to treatment, the juvenile is to be bound over.[483] Justice Meschke also concurred, stating that the language in sections one and two of the transfer statute "hopelessly and senselessly conflict" concerning who must prove or disprove a juvenile's amenability to treatment.[484]

MINES AND MINERALS

CONTINENTAL RESOURCES, INC. V. FARRAR OIL CO.

In *Continental Resources, Inc. v. Farrar Oil Co.*,[485] Continental Resources, Inc. (Continental), an oil and gas lease holder, brought an action against Farrar Oil Co. (Farrar), a lease owner in the same spacing unit, seeking a declaratory judgment that Continental's proposed

476. *Id.*
477. *Id.* at 220.
478. *Id.*
479. *Id.* (citing *In re* M.D.N., 493 N.W.2d 680, 689 (N.D. 1992) (Levine, J., concurring)).
480. *Id.* at 220 (citing *M.D.N.*, 493 N.W.2d at 689).
481. *Id.*
482. *Id.* (citing *In re* T.M., 512 N.W.2d 441, 443 (N.D. 1994) (quoting *M.D.N.*, 493 N.W.2d at 689)).
483. *Id.*
484. *Id.* at 220-221.
485. 559 N.W.2d 841 (N.D. 1997).

horizontal well would not be considered a subsurface trespass[486] of Farrar's leasehold.[487] Farrar counterclaimed for a declaration that the proposed horizontal well would constitute a trespass of its leasehold.[488] The district court entered summary judgment declaring that Continental's drilling of a horizontal well in a force-pooled spacing unit would not be a trespass; Farrar appealed.[489] The North Dakota Supreme Court held that Continental, by virtue of being authorized by the state Industrial Commission's forced pooling order, would not be committing a subsurface trespass by drilling a horizontal well through Farrar's subsurface formation.[490]

Continental held oil and gas leases on the northwest and southeast quarters of Section 17, Township 131 North, Range 103 West, Bowman County, North Dakota.[491] Farrar held oil and gas leases on the northeast and southwest quarters of the same section.[492] Section 17 lies within zone II of the Cedar Hills-Red River "B" oil field.[493] In September of 1995, the state Industrial Commission assigned temporary spacing in zone II for a maximum of two horizontal wells[494] for each 640 acre unit.[495] Thereafter, Continental proposed to Farrar that a horizontal well be drilled, beginning at a surface location in Continental's northwest quarter, and crossing under the southwest quarter of Farrar's leasehold.[496] Farrar turned down the proposal.[497]

Continental petitioned the Industrial Commission to force the pooling of all interests relative to the proposed well in section 17,[498] and in

486. Continental Resources, Inc. v. Farrar Oil Co., 559 N.W.2d 841, 841 (N.D. 1997). A subsurface trespass may be defined as the bottoming of a well on another's land without permission. *Id.* at 844 (citing HOWARD R. WILLIAMS & CHARLES I. MEYERS, MANUAL OF OIL AND GAS TERMS (8th ed. 1991)). For oil and gas purposes, a subsurface trespass occurs when someone intentionally or unintentionally drills a "slant" or directional well. *Id.* Subsurface trespass is as wrongful as surface trespass, thus the same liability attaches. *Id.*

487. *Id.* at 842-44.

488. *Id.* at 842.

489. *Id.*

490. *Id.* at 846.

491. *Id.* at 842.

492. *Id.*

493. *Id.*

494. *Id.* In some instances, North Dakota regulations define a horizontal well as "a well with a horizontal displacement of the well bore drilled at an angle of at least eighty degrees within the productive formation of at least three hundred feet [91.44 meters]." *Id.* at 843 n.1 (citing N.D. ADMIN. CODE § 43-02-11-01(2)). N.D. ADMIN. CODE § 43-02-03-18 fixes well locations in spacing units "[i]n the absence of an order by the commission setting spacing units for a pool." *Id.*

495. *Id.* at 842.

496. *Id.* at 842-43.

497. *Id.* at 843.

498. *Id.*

October of 1995, the Commission so ordered.[499] In spite of the forced pooling order, Farrar notified Continental that it would treat any drilling under its leasehold as an illegal subsurface trespass.[500] Continental sued Farrar for a declaratory judgment stating that drilling the proposed well would not constitute a subsurface trespass of Farrar's leasehold.[501] Farrar counterclaimed for a declaration stating that the horizontal well would trespass its leasehold.[502] Continental moved for summary judgment, and both Continental and Farrar agreed that there were no contested material facts.[503]

The trial court had concluded that the Industrial Commission's forced pooling order properly exercised the state's police power and superseded the property law of trespass.[504] As long as Continental complied with the Commission's rules and regulations in drilling the well, the forced pooling order would preclude any claim by Farrar.[505] The North Dakota Supreme Court agreed.[506]

The supreme court framed the issue as whether or not state police powers might be exercised "by the Commission in enforcement of the North Dakota Oil and Gas Conservation Act to the extent necessary to supersede the private property law relating to trespass."[507] The court noted that property rights are protected by the North Dakota Constitution.[508] Further, the court explained that in exercising its police powers, the state is not limited to matters relating strictly to public health, morals, and keeping the peace, but may intervene whenever public interests demand it.[509] Additionally, the court stated that the legislature has great discretion in determining what the interests of the public require and what steps are necessary to protect such interests.[510]

The court further explained that state police powers are properly used when the Industrial Commission orders spacing or compels

499. *Id.* The pooling order directed, effective on the date of first operations, the operator of a well in section 17 to conduct its operations to protect correlative rights; directed the operator to share with all interest owners, without unnecessary expense, their just, equitable, and proportionate share of production; directed each working interest owner to reimburse the operator for a proportionate share of reasonable actual costs of the well, plus a reasonable charge for supervision; and authorized the operator, if it carried a nonparticipating lessee's share of costs, to recover a risk penalty from the nonparticipating lessee. *Id.* The order reserved power to the Industrial Commission to determine proper costs in the event of any dispute. *Id.*

500. *Id.* at 844.

501. *Id.*

502. *Id.*

503. *Id.*

504. *Id.*

505. *Id.*

506. *Id.*

507. *Id.*

508. *Id.* at 845 (citing N.D. CONST., art. I, §§ 1, 12, & 16).

509. *Id.* (citing State v. Cromwell, 9 N.W.2d 914, 919 (N.D. 1943)).

510. *Id.* at 846 (citing *Cromwell*, 9 N.W.2d at 919).

pooling,[511] and that in the present case, the police powers exercised by the Commission superseded Farrar's right to use its oil and gas properties as it wished.[512] Because force-pooled oil and gas operations are the proper "conduct of such operations upon each separately owned tract in the drilling unit by the several owners thereof,"[513] authorized operations are not affected by the property law of trespass, and property law is superseded.[514] Consequently, the court affirmed the trial court's declaratory judgment stating that because Continental is authorized by the Industrial Commission's forced pooling order, it will not trespass upon Farrar's property rights by drilling the authorized horizontal well through Farrar's subsurface formation.[515]

MINES AND MINERALS—LEASES

RIDL V. EP OPERATING LTD. PARTNERSHIP

In *Ridl v. EP Operating Ltd. Partnership,*[516] the North Dakota Supreme Court affirmed the district court's decision upholding a 1973 oil and gas lease and dissolving a 1995 satisfaction of an oil and gas lease which was recorded by the Ridls with the Register of Deeds. In March of 1969, the Ridls gave an exclusive oil and gas lease on their land to EP for a term of five years and as long as oil or gas was produced therefrom, or as long as the lessee in good faith conducted drilling operations.[517] In 1973, some of the Ridls' land was included in the Dickinson Sand Unit.[518] Later that same year, the Ridls executed an

511. *Id.* (citing Slawson v. North Dakota Indus. Comm'n, 339 N.W.2d 772, 774 (N.D. 1983) (stating that the Commission is authorized to treat an unleased mineral interest as cost-free for one-eighth when force pooling); Hystad v. Industrial Comm'n, 389 N.W.2d 590, 594 (N.D. 1986) ("[The] Commission has the authority to divide a pool into geographic areas (i.e. zone a pool) for non-uniform spacing units when necessary to prevent waste, avoid drilling unnecessary wells, or to protect correlative rights"); Texaco Inc. v. Industrial Comm'n, 448 N.W.2d 621, 624 (N.D. 1989) ("Giving effect to both the spacing and pooling provisions of ch. 38-08, the Commission may, within the guidelines of Section 38-08-08, N.D.C.C., issue compulsory pooling orders retroactive to the date of first operations")).

512. *Id.* at 846.

513. *Id.* (citing N.D. CENT. CODE § 38-08-08(1) (1991)).

514. *Id.* (citing Union Pac. Resources Co. v. Texaco, Inc., 882 P.2d 212 (Wyo. 1994) (finding an Oil and Gas Conservation Commission order enlarging a drilling unit superseded the terms of an operating agreement setting the working interest percentages of ownership in original unit); Nunez v. Wainoco Oil & Gas Co., 488 So.2d 955, 964 (La. 1986) ("[W]hen the Commissioner of Conservation has declared that landowners share a common interest in a reservoir of natural resources beneath their adjacent tracts, such common interest does not permit one participant to rely on a concept of individual ownership to thwart the common right to the resource as well as the important state interest in developing its resources fully and efficiently"); Texas Oil and Gas Corp. v. Rein, 534 P.2d 1277, 1279 (Okla. 1974) ("To hold otherwise would frustrate the intent of the [Conservation] Act because the owner desiring to drill would not be entitled to do so unless he held a lease covering the well location designated by the Commission")).

515. *Id.*

516. 553 N.W.2d 784 (N.D. 1996).

517. Ridl v. EP Operating Ltd. Partnership, 553 N.W.2d 784, 786 (N.D. 1996).

518. *Id.*

exclusive oil and gas lease for the land covered by the 1969 lease for a term of five years, and"as long thereafter as oil, gas, distillate . . . is produced hereunder, or any operation is conducted, any payment is made, or any condition exists, which as hereinafter provided continues this lease in force."[519] Both leases provided for unitization and provided that unitized production would constitute production under the lease.[520]

On April 15, 1981, the Ridls ratified the 1973 lease and on May 12, 1981, EP's predecessor began drilling a well and completed it as a dry well on June 2, 1981.[521] On May 25, 1995, relying on section 47-16-36 of the North Dakota Century Code, the Ridls sent EP a letter requesting release of the 1973 lease, except for the land in the Dickinson Unit, a partial release for EP to sign, and a notice of termination of the 1973 lease.[522] The notice stated the lease was forfeited and void unless EP notified the Register of Deeds within twenty days that the lease had not been forfeited and also demanded that EP execute and record the surrender of the lease.[523] The letter was delivered to EP on May 31, 1995, and received by EP's legal department on June 15, 1995.[524] On June 15, 1995, the Ridls recorded the notice of termination of the 1973 lease and a Satisfaction of Oil and Gas Lease with the Register of Deeds, stating that the 1973 lease, except for the land included in the Dickinson Unit, was forfeited.[525] On June 16, 1995, EP sent letters to the Register of Deeds and the Ridls' attorney stating the lease was in full force and effect and on July 5, 1995, recorded a notice of oil and gas lease with the Register of Deeds, declaring the 1973 lease had been and still was in full force and effect as to all of the acreage covered by the lease.[526] On August 8, 1995, the Ridls sued EP for cancellation of the 1973 lease, claiming EP did not timely respond to the notice of termination and EP answered and counterclaimed.[527] Both parties filed motions for summary judgment and the trial court granted summary judgment to EP.[528] The Ridls appealed.[529]

The Ridls argued that EP forfeited any interest it had in the 1973 lease when it failed to respond to the notice of termination of the lease

519. *Id.*
520. *Id.*
521. *Id.*
522. *Id.* (citing N.D. CENT. CODE § 47-16-36 (1995)).
523. *Id.*
524. *Id.*
525. *Id.*
526. *Id.*
527. *Id.*
528. *Id.*
529. *Id.* at 787.

within the statutory requirement of twenty days.[530] The North Dakota Supreme Court responded to this claim by stating that the only consequence for a lessee's failure to notify the Register of Deeds within twenty days of notice of termination is the loss of record evidence.[531] The court stated further that the statute provides that if the owner of the lease refuses to execute a release, the owner of the land may sue in court to obtain a release.[532] The court, in concluding that EP did not lose its interest in the 1973 lease when it failed to timely respond to the notice of termination, said that if the statute was interpreted as the Ridls argued, it would make the leased land owner's right to "sue for a release, superfluous."[533] The court also stated that the Ridls' reliance on *Taurus Corp. v. Roman Yourk Equity Pure Trust*[534] was misplaced.[535] The court, in light of their reading of the language of section 47-16-36 and 47-16-37 of the North Dakota Century Code and in reconsideration of *Taurus*, declined to extend the ruling in *Taurus* to cases involving alleged breach of implied covenants.[536]

The Ridls contended on appeal that the district court erred by granting summary judgment to EP on the grounds that the Ridls did not make a proper demand for performance of the implied covenant of reasonable development.[537] The court concluded that it could not reasonably be inferred from the letter or the complaint that a demand had been made that EP further develop the leasehold.[538] Rather, stated the court, the letter and the complaint "implicitly warned against further development." Furthermore, the court stated that the Ridls' demands did not comply with a clause in the 1973 lease dealing with the lessee's failure to comply with its obligations.[539]

The Ridls final contention, that the trial court erred in concluding that the 1973 lease did not require production in paying quantities, was not addressed by the North Dakota Supreme Court.[540] The transcript of

530. *Id.* (citing N.D. CENT. CODE § 47-16-36 (1995)).

531. *Id.* The court quoted North Dakota Century Code section 47-16-36, which provides in part:

> If the lessee, his successors or assigns, shall not notify the register of deeds, as above provided, then the register of deeds shall record said satisfaction of lease and thereafter the record of the said lease shall not be notice to the public of the existence of said lease or of any interest therein, or rights thereunder, and said record shall not be received in evidence in any court of the state on behalf of the lessee, his successors or assigns, against the lessor, his successors or assigns.

N.D. CENT. CODE § 47-16-36 (Supp. 1997).

532. *Ridl*, 553 N.W.2d at 787 (quoting N.D. CENT. CODE § 47-16-37).

533. *Id.*

534. 264 N.W.2d 688 (N.D. 1978).

535. *Ridl*, 553 N.W.2d at 787.

536. *Id.* at 788 (citing N.D. CENT. CODE §§ 47-16-36, -37).

537. *Id.*

538. *Id.*

539. *Id.* at 789.

540. *Id.*

the trial court hearing shows that this claim was going to be asserted only if summary judgment was not granted to either of the parties, and since summary judgment was granted to EP, the court concluded that the claim was effectively withdrawn by the Ridls.[541] Because the court was upholding the trial court's granting of summary judgment, the issue was of no further significance in the case.[542]

Justice Meschke dissented, disagreeing with the majority's refusal to follow *Taurus* and the majority's interpretation of section 47-16-36 of the North Dakota Century Code.[543] The effect of the majority's decision, Justice Meschke stated, was to deprive oil and gas lessors of an important tool to encourage development, forcing lessor's to allow lessees to "warehouse" oil resources.[544] He stated that section 47-16-36 was enacted to provide an affordable and prompt method for landowners to clear the cloud of title to minerals in a lease that the landowner claims has been forfeited without going to court, and that the statute applies to leases where the forfeiture is disputed, as well as those where the lease has been forfeited on its face.[545] Furthermore, stated Justice Meschke, section 47-16-36 would serve little purpose if the lessor was required to seek a judicial determination that the lease was terminated before using the tools the statute provides.[546] Justice Meschke expressed his disapproval of the majority's "gutting" of section 47-16-36 stating that the statute is left "meaningless and worthless" as a result of the majority's interpretation.[547] Finally, Justice Meschke said there was no basis for the majority to exclude from the operation of section 47-16-36 forfeitures resulting from a violation of an implied covenant.[548] He stated that the statute makes no such distinction and that "courts are not authorized to legislate by reading exceptions into a statute that are not there."[549]

TORTS—DEFAMATION

VANOVER V. KANSAS CITY LIFE INSURANCE COMPANY

In Vanover v. Kansas City Life Ins. Co.,[550] Edward D. Vanover appealed from a district court amended judgment, claiming the trial

541. *Id.*
542. *Id.*
543. *Id.* at 789-92 (citing N.D. CENT. CODE § 47-16-36; Taurus Corp. v. Roman Yourk Equity Pure Trust, 204 N.W.2d 688 (N.D. 1978)).
544. *Id.* at 789.
545. *Id.* at 791.
546. *Id.* at 790 (citing *Taurus*, 264 N.W2 at 688).
547. *Id.* at 790-92.
548. *Id.* at 791.
549. *Id.*
550. 533 N.W.2d 192 (N.D. 1996).

court erred in vacating the jury verdict from the first trial and ordering a new trial.[551] Kansas City Life Insurance Company (Kansas City) cross-appealed from the trial court's denial of its motion for judgment notwithstanding the verdict.[552] The North Dakota Supreme Court, modifying the judgment and affirming the district court, found the trial court did not abuse its discretion in vacating the first verdict and ordering a new trial.[553]

In 1983, Vanover was terminated from his position as a general agent for Kansas City and Armour Life Insurance,[554] after a dispute arose over unpaid commissions.[555] Thereafter, Vanover went to work for Globe Life and Accident Insurance Company (Globe) and American Health and Life Insurance Company (American).[556] Vanover sued Armour for the unpaid commissions and Kansas City for wrongful termination.[557] After Vanover filed suit, Kansas City sent letters to all Kansas City general agents, to American, and to Globe, stating Vanover had been terminated "for cause."[558] After receiving the letters, Globe and American terminated Vanover.[559] Consequently, Vanover sued Kansas City for defamation claiming Kansas City had made unprivileged and false statements that Vanover had been terminated "for cause."[560]

Kansas City moved for summary judgment, which the trial court granted.[561] Vanover appealed from the district court's judgment, and the North Dakota Supreme Court reversed and remanded, directing the district court to make findings as to whether the statements that Vanover was terminated "for cause" could be construed as defamatory.[562]

On remand, the jury returned a verdict in favor of Vanover, finding he had been libeled and slandered and awarded him damages of $1,000,250.[563] Kansas City moved for a judgment notwithstanding the verdict or a new trial.[564] The trial court granted a motion for a new trial on grounds it had erred in using a verdict form that did not distinguish the jury's findings of fact as to each letter.[565] At the new trial, the jury found all three letters defamatory and awarded Vanover damages of

551. Vanover v. Kansas City Life Ins. Co., 553 N.W.2d 192, 195 (N.D. 1996).
552. *Id.* at 194.
553. *Id.* at 195.
554. *Id.* at 194. Armour Life Insurance is a subsidiary of Kansas City. *Id.*
555. *Id.*
556. *Id.*
557. *Id.*
558. *Id.*
559. *Id.*
560. *Id.*
561. *Id.*
562. *Id.*
563. *Id.*
564. *Id.*
565. *Id.*

$1,900,250.[566] Kansas City moved to correct the judgment, and the trial court amended the award of damages to $250.[567] Vanover appealed and Kansas City cross-appealed.[568]

On appeal, Vanover argued the trial court erred in vacating the jury's verdict from the first trial and ordering a new trial.[569] The supreme court will not reverse a trial court's decision to grant a new trial unless the trial court acts unreasonably, arbitrarily, or unconscionably.[570] In granting a new trial, the trial court found that it had erred because it did not use verdict forms which allowed the jury to make findings of fact as to each letter.[571] Conversely, Vanover contended there was only one publication to numerous recipients, and therefore only one finding of damages was required. Vanover's argument, however, did not persuade the supreme court, which found there were "three letters constituting three publications to three different groups of people."[572] Thus, the supreme court did not find the trial court abused its discretion in ordering a new trial.[573]

In determining whether the trial court erred in amending the jury's award of damages after the second trial, the supreme court views "the evidence in the light most favorable to the verdict and determine only whether there is substantial evidence to support it."[574] The supreme court found there was substantial evidence that Kansas City's letters damaged Vanover's reputation, and thus upheld the jury's award of compensatory damages to Vanover.[575]

In its decision to uphold the jury's award of compensatory damages, the supreme court reviewed the trial court's memorandum opinion which amended the award.[576] The trial court ruled that in a defamation action, "there must be special damages before there can be compensatory damages before there can be exemplary damages."[577] Further, the trial court ruled that because the jury only found special damages for the letter which was sent to American, all of the other damages failed because in order to get to compensatory and exemplary damages, there must be a finding of special damages.[578] Accordingly,

566. *See Vanover*, 553 N.W.2d at 194-95.
567. *Id.* at 195.
568. *Id.*
569. *Id.*
570. *Id.* (citing to Delzer v. United Bank, 527 N.W.2d 650 (N.D. 1995); Okken v. Okken, 325 N.W.2d 264 (N.D. 1982)).
571. *Vanover*, 553 N.W.2d at 195.
572. *Id.*
573. *Id.*
574. *Id.* at 197.
575. *Id.*
576. *Id.* at 195-96.
577. *Vanover*, 553 N.W.2d at 195-96.
578. *Id.*

the supreme court found the requirement of proving special damages in a libel action is a minority rule and instead, the trend is to follow the Restatement Second of Torts § 569, which allows recovery in libel actions without proof of special damages.[579] Thus, the supreme court concluded it is inappropriate to require proof of special damages in libel actions, but proof of any compensatory or actual damages will support an award of exemplary damages.[580]

Finally, the supreme court held that the punitive damage award was not excessive.[581] An award for punitive damages is excessive if it is "so great that it indicates passion or prejudice on the part of the jury."[582] The rational for the supreme court's holding was in its review of the record, there was no ground on which to find the verdict excessive.[583]

TORTS—LIABILITY

BOUCHARD V. JOHNSON

In *Bouchard v. Johnson*,[584] the Federal District Court for the District of North Dakota certified two questions to the North Dakota Supreme Court: 1) whether the North Dakota Skiing Responsibility Act[585] (Skiing Act) provides an exclusive list of duties for ski area operators, barring negligence actions by skiers; and 2) whether the Skiing Act violates the equal protection or due process clauses of the United States or North Dakota Constitutions, or the special laws or open courts clauses of the North Dakota Constitution.[586]

In 1994, a Canadian citizen was fatally injured at a Walhalla, North Dakota, ski resort when she struck a tree while skiing down a run.[587] Leda Bouchard, acting as trustee for the heirs of the skier, filed a wrongful death suit against the ski resort and its owner claiming negligence.[588] The ski resort denied negligence, claiming they fully complied with their duties under the Skiing Act and were therefore insulated from liability.[589] The ski resort moved for summary judgment and the federal district court certified the above questions.[590]

579. *Id.* at 197.
580. *Id.*
581. *Vanaover*, 553 N.W.2d at 199.
582. *Id.* (citing Dewey v. Lutz, 462 N.W.2d 435, 4434 (N.D. 1990)).
583. *Id.*
584. 555 N.W.2d 81 (N.D. 1996).
585. N.D. CENT. CODE ch. 53-09 (1995).
586. Bouchard v. Johnson, 555 N.W.2d 81, 82 (N.D. 1996).
587. *Id.* at 82.
588. *Id.*
589. *Id.*
590. *Id.*

As to the first question, whether the list of duties provided for ski resort operators in the Skiing Act is exclusive, the North Dakota Supreme Court concluded that the list was not exclusive.[591] The court stated that if the language of the statute is unambiguous, the court will follow it; but the court will not interpret the statute as though language that is not contained in the statute should have been added, nor will the court construe a statute to reach an absurd result.[592] The court stated that the statute does not, on its face, indicate whether the list of duties is exclusive.[593] There is no evidence in the legislative history illustrating an intent to make the list exclusive, and there is no mention of exclusivity of the list in the legislative committee hearings.[594] The court found that there were comments in the legislative history describing the statute as a method to limit ski resort operators' liability, but no comments indicating the Skiing Act is to be a complete bar to recovery.[595] The court concluded that the legislature intended the statute to protect ski resort operators from lawsuits by patrons injured as a result of risks inherent in the sport of skiing, but did not intend for the statute to immunize operators from all negligence claims.[596]

The court, citing the Utah Supreme Court,[597] discussed two types of inherent risks.[598] The first consists of risks such as steep grades, powder, and mogul runs which skiers wish to encounter as part of the total skiing experience.[599] The second type of inherent risks are hazards that no one wishes to encounter, but cannot be eliminated by reasonable care on the part of the ski resort, such as sudden changes in weather and snow conditions.[600] The court stated that ski resort operators cannot alleviate these inherent risks, and thus are not liable for injuries caused by such risks.[601] However, stated the court, that does not mean that ski operators are fully insulated from liability.[602] If for example, there is a defective design in a ski run as a result of the operators negligence, creating a risk that is not inherent in the sport, the operator should be held liable.[603]

Bouchard argued that the Skiing Act conflicts with provisions of the comparative fault statute in that it "carves out an exception from the general comparative fault provision, despite the fact that the comparative

591. *Id.* at 83.
592. *Id.*
593. *Id.*
594. *Id.*
595. *Id.*
596. *Id.* at 85.
597. *See* Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1047 (Utah 1991).
598. *Bouchard*, 555 N.W.2d at 85.
599. *Id.*
600. *Id.*
601. *Id.* (quoting *Clover*, 808 P.2d at 1047).
602. *Id.*
603. *Id.* at 85-6.

fault statute is on its face applicable to all tort victims."[604] The comparative fault statute provides that a person is barred from recovery for injury caused by an inherent risk in the sport of skiing and where it has been established that the person knowingly exposed himself or herself to the potential hazards of the sport.[605] The court rejected Bouchard's argument, stating that the Skiing Act does not completely bar recovery but rather defines ski resort operator's duties, and that a skier is barred from recovery, only if the injury was caused by an inherent risk in skiing.[606] Thus, concluded the court, the two statutes are consistent with one another, rather than in conflict.[607]

The court then discussed whether the Skiing Act violates the equal protection guarantees of the North Dakota Constitution.[608] The court said that because the right to recover for personal injury is an important substantive interest, intermediate scrutiny is required.[609] Therefore, the court had to determine whether there was a "close correspondence between statutory classification and legislative goals."[610] Bouchard argued that the Skiing Act created an impermissible classification by favoring ski resort operators and giving them protection from liability not afforded other landowners.[611] The court, not persuaded by this argument, stated that statutes may create reasonable classifications and that the classification created in the Skiing Act was reasonable.[612] The legislative goal was only to *limit* liability of ski resort operators from risks inherent in the sport of skiing, not eliminate it altogether.[613] If the limitations were not in place, ski resorts would be subject to unlimited exposure to liability, thus the classification merely helps to protect resorts from complete liability.[614] Therefore, concluded the court, the classification has a close correspondence to the legislative intent and does not violate equal protection.[615]

The court then discussed whether the Skiing Act violates the special law provision of the North Dakota Constitution and concluded that it does not.[616] The special law provision of the Constitution provides in part that "no local or special laws may be enacted."[617] The court stated

604. *Id.* at 86.
605. *Id.* (quoting N.D. CENT. CODE § 53-09-10 (1995)).
606. *Id.*
607. *Id.*
608. *Id.* at 87.
609. *Id.*
610. *Id.* (citations omitted).
611. *Id.*
612. *Id.* at 88.
613. *Id.*
614. *Id.*
615. *Id.*
616. *Id.*
617. *Id.* (quoting N.D. CONST. art IV, § 13).

that "[a] special law only applies to particular persons or things of a class, while a general law applies to all person[s] and things of a class" and that if the statute treats all persons equally, the statute is general.[618] In the court's view, the Skiing Act treats all persons operating ski resorts within the state equally, and therefore the court concluded that the Skiing Act is a general law.[619]

Lastly, the court addressed the question whether the Skiing Act violates the right of access to the courts.[620] The court noted that the right of access is not absolute.[621] The court stated further that the Skiing Act is not an absolute bar and thus does not deny access to the courts.[622]

TRADE REGULATION—TRADE NAMES AND TRADEMARKS

KAT VIDEO PRODUCTIONS, INC. V. KKCT-FM RADIO

In *KAT Video Productions, Inc. v. KKCT-FM Radio,*[623] a video producer using the name "KAT Productions" and a lion logo brought a trademark infringement action against a radio station using the name "Kat Country" and a tiger logo.[624] The district court entered summary judgment in favor of the radio station and the video producer appealed.[625] The North Dakota Supreme Court held that the case was unsuitable for summary judgment because there existed genuine issues of material fact concerning the likelihood of confusion between the parties' trademarks.[626]

In 1989, Todd Muggerud founded KAT Productions, a video production business.[627] Muggerud "conceived" the name "KAT," and decided on a lion's head logo because he intended to distinguish his business from other competitors.[628] In 1993, Kat Country, a country music radio station and audio production company was founded and began using the name "Kat" and a tiger's head logo in its advertising.[629] Upon learning of Kat Country's advertising campaign, KAT Productions registered its logo and name in accordance with state law.[630]

618. *Id.*
619. *Id.*
620. *Id.* at 89 (quoting N.D. CONST. art I, § 9 (providing in part that "[a]ll courts shall be open, and every man for any injury done . . . shall have remedy by due process of law")).
621. *Id.*
622. *Id.*
623. 560 N.W.2d 203 (N.D. 1997).
624. KAT Video Prods., Inc. v. KKCT-FM Radio, 560 N.W.2d 203, 206 (N.D. 1997).
625. *Id.*
626. *Id.* at 212.
627. *Id.* at 206.
628. *Id.*
629. *Id.*
630. *Id.* (citing N.D. CENT. CODE §§ 47-22, 47-25 (1995)).

In September of 1994, KAT Productions filed suit against Kat Country for trademark and trade name infringement.[631] In July of 1995, KAT Productions moved for a temporary injunction enjoining Kat Country from using the "Kat" name and tiger logo.[632] In an affidavit before the district court, Muggerud provided the names of several businesses and individuals who had confused the two businesses or mistakenly assumed they were affiliated.[633] After a hearing on the motion for the temporary injunction, the court requested an amended motion in order to position the case for summary judgment.[634] In April of 1996, the court's memorandum opinion stated that in determining whether the likelihood of confusion exists between parties' trademarks and trade names, a court must examine six key areas: strength of trademark or trade names; similarities between marks; competitive proximity of product; alleged infringer's intent to confuse the public; evidence of actual confusion; and the degree of care reasonably expected of plaintiff's potential customers.[635]

Examining the strength of "KAT," the trial court found that "KAT" was an arbitrary trademark, and thus enjoyed the greatest amount of protection under state law.[636] In its summary judgment finding, the trial court found no infringement by Kat Country because the trademarks were distinguishable, the companies did not directly compete with each other, there was "no basis to suggest consumers" were confused, and Kat Country did not intend to create the illusion that their product was affiliated with KAT Productions.[637] KAT Productions appealed.[638]

The North Dakota Supreme Court explained that trademarks identify goods and services and trade names identify businesses, but the standard of infringement is the same.[639] A trade name is a distinctive word, name, symbol, or other designation that identifies and distinguishes one business from another.[640] Moreover, to prevail on a claim for trademark or trade name infringement, a party must show that it is likely that ordinary and prudent purchasers of goods and services will be misled or confused as to the source of the goods at issue.[641]

631. *Id.*
632. *Id.*
633. *Id.*
634. *Id.* at 206-07.
635. *Id.* at 207 (citing Anheuser-Busch, Inc. v. Balducci Publications, 28 F.3d 769, 774 (8th Cir. 1994)).
636. *Id.*
637. *Id.*
638. *Id.* at 206.
639. *Id.* at 207 (citing American Steel Foundries v. Robertson, 269 U.S. 372, 380 (1926)).
640. *Id.* at 208 (citing *American Steel*, 269 U.S. at 380; N.D. CENT. CODE § 47-25-01 (1995)).
641. *Id.* (citing Mobil Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d 254, 256 (2d Cir. 1987) (referring to federal infringement law under the Lanham Act)).

First, the supreme court considered the strength or distinctiveness of the trademark and trade name.[642] The strength of a trademark or trade name is measured by public opinion[643] and falls into four broad categories.[644] The court found the word "KAT" was an arbitrary or fanciful mark because it did not describe the product in any way, and therefore, was entitled to maximum protection under the law.[645]

Second, the court addressed the similarities in the marks.[646] Stating that the marks must be assessed "in light of the marketplace perception,"[647] the court found that a reasonable consumer might not distinguish the marks without a side-by-side comparison.[648] Consequently, the court found that because different factual inferences could be made about similarities in the marks, the issue was not suitable for summary judgment.[649]

Third, the court discussed the competitive proximity of the products.[650] The court noted that "the touchstone of trademark infringement is confusion, not competition."[651] The court also stated that the test is whether the services are related enough that prospective purchasers are likely to believe the two services are associated.[652] While the supreme court did not disagree with the trial court's conclusion that the two companies' products were dissimilar and did not directly compete with one another,[653] the court found that the companies were members of the same communications industry and shared some services.[654] Consequently, the court stated that whether the proximity in the products created a perception of affiliation should be determined by a fact finder.[655]

642. *Id.* at 209.

643. *Id.* (citing Jordache Enters., Inc. v. Levi Strauss, 841 F. Supp. 506, 515 (S.D.N.Y. 1993)).

644. *Id.* (citing Beer Nuts, Inc. v. Clover Club Foods Co., 711 F.2d 934, 939 (10th Cir. 1983)). The four categories of terms and marks used in legal classifications are generic, descriptive, suggestive, and arbitrary or fanciful. *Id.* An arbitrary or fanciful designation is considered worthy of the highest protection because it is identified exclusively with a particular good or service. *Jordache*, 841 F. Supp. at 515. A suggestive classification suggests something about the product, yet does not describe it, and is thus protected by law. *KAT Video*, 560 N.W.2d at 209 (citing Woodroast Sys. v. Restaurants Unlimited, 793 F. Supp. 906, 911 (D. Minn. 1992)). A descriptive designation describing the nature of the goods, or a generic classification stating the type of goods, are weak marks and are provided the least amount of protection under trademark and trade name law. *Woodroast*, 793 F. Supp. at 911-12.

645. *KAT Video*, 560 N.W.2d. at 210.

646. *Id.*

647. *Id.* (citing Calvin Klein Cosmetics Corp. v. Lenox Lab., 815 F.2d 500, 504 (8th Cir. 1987)).

648. Id.; *see also Beer Nuts*, 711 F.2d at 941 (stating the marks must be compared in light of what occurs in the marketplace, where a consumer relies on his or her memory of the mark and not on an exact sample).

649. *KAT Video*, 560 N.W.2d at 210.

650. *Id.*

651. *Id.* (citing Mutual of Omaha Ins. Co. v. Novak, 836 F.2d 397, 399 (8th Cir. 1987)).

652. *Id.* (citing International Kennel Club v. Mighty Star, Inc., 846 F.2d 1079, 1089 (7th Cir. 1988)).

653. *Id.* at 211.

654. *Id.*

655. *Id.*

Fourth, the court addressed the alleged infringer's intent to confuse the public.[656] Stating that the evidence did not indicate Kat Country's intent to confuse consumers in the marketplace, the court then noted that intent to confuse, alone, is not necessary for liability to attach.[657]

Fifth, the court examined whether there existed evidence of actual confusion between the marks in the marketplace.[658] The court stated that the test for actual confusion looks to whether purchasers have actually been confused by the purportedly similar marks.[659] The court found that where Muggerud, through testimony and affidavit, submitted a list of examples indicating instances in which consumers had confused the two businesses, KAT Productions met its burden of showing a genuine issue of material fact to overcome summary judgment.[660] Consequently, the court stated that the fact-finder must determine whether sufficient evidence of actual confusion existed.[661]

Finally, in discussing the degree of care reasonably expected of the plaintiff's potential customers,[662] the court explained that the more money a consumer spends on a product, the greater care the consumer is likely to exhibit in the marketplace, resulting in less confusion among trade names and trademarks.[663] The supreme court agreed with the trial court in finding that purchasers of the products of audio and video services exercise a high degree of care, thus lessening the chance of any trademark or trade name confusion.[664] However, the court stated that material issues of fact existed concerning an ordinary purchaser's level of sophistication and the amount of care used by that purchaser in the beginning stages of selecting a producer.[665] Therefore, the court ruled that there existed genuine issues of material fact which should be resolved at trial, and summary judgment was not appropriate.[666]

While two of the six issues were correctly decided as undisputed based on submitted evidence, there existed contested issues of fact concerning similarity of the marks, proximity of the products, evidence of actual confusion, and the degree of care used by an ordinary

656. *Id.*
657. *Id.* (citing Mutual of Omaha Ins. Co. v. Novak, 836 F.2d 397, 400 (8th Cir. 1987)).
658. *Id.*
659. *Id.* (citing Jordache Enters., Inc. v. Levi Strauss, 841 F. Supp. 506, 515 (S.D.N.Y. 1993)).
660. *Id.* at 211-12.
661. *Id.* at 212.
662. *Id.* (citing Beer Nuts, Inc. v. Clover Club Foods Co., 711 F.2d 934, 941 (10th Cir. 1983)).
663. *Id.* (citing Woodroast Sys. v. Restaurants Unlimited, 793 F. Supp. 906, 911 (D. Minn. 1992) and Mutual of Omaha Ins. Co. v. Novak, 836 F.2d 397, 401 (8th Cir. 1987)).
664. *Id.*
665. *Id.*
666. *Id.*

purchaser.[667] Thus, the supreme court reversed the dismissal of KAT Production's complaint and remanded the case for trial. The court further instructed the trial court to make findings on the remaining issues of fact and to consider the matter in its entirety to determine whether there is a likelihood of confusion between KAT Productions and Kat Country's trade names and trademarks.[668]

667. *Id.; see, e.g.*, Nike, Inc. v. Just Did It Enters., 6 F.3d 1225, 1233 (7th Cir. 1993) (remanding the case for trial because the district court inappropriately settled issues of material fact through summary judgment).

668. *KAT Video*, 560 N.W.2d at 212.